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Supreme Court of the United States

OCTOBER TERM, 1936

No. 77

HARRIET C. BINNEY, FREDERIC CUNNINGHAM, AND CONSTANCE C. PERTZOFF, ET AL., APPELLANTS,

vs.

HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS

APPEAL FROM THE PROBATE COURT OF THE COUNTY OF NORFOLK, COMMONWEALTH OF MASSACHUSETTS

FILED MAY 28, 1936.

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[fol. 5]

IN PROBATE COURT OF NORFOLK COUNTY

In Equity

HARRIET C. BINNEY et als.

v.

HENRY F. LONG, Commissioner of Corporations and Taxation

PETITION IN EQUITY FOR ABATEMENT OF SUCCESSION—Filed September 20, 1933

To the Honorable the Judge of the Probate Court in and for the County of Norfolk:

Respectfully represent Harriet C. Binney, of Boston, Constance C. Pertzoff, of Brookline, Susannah C. Coolidge, of Milton, all of Massachusetts, and Frederic Cunningham, of New York, Frederic Cunningham and George S. Parker of said Boston, as they are Trustees under Indenture of Trust dated January 26, 1877, and said Frederic Cunningham as he is Administrator of the Estate of Hetty Sullivan Lawrence Cunningham, William Lawrence, John S. Lawrence, Leverett Saltonstall and Augustus Hemenway, as they are Trustees under the Will of Sarah E. Lawrence, late of Brookline, Petitioners, that they bring this Petition against Henry F. Long, in his capacity as Commissioner [fol. 6] of Corporations and Taxation of the Commonweath of Massachusetts, Respondent, and allege him to be the only

party interested in the matter of said Petition, and further represent:

(1) That Hetty Sullivan Lawrence Cunningham died August 20, 1931, intestate, and a resident of Brookline in the County of Norfolk, leaving as her sole heirs-at-law her four children, the Petitioners, and said Frederic Cunningham has been duly appointed and qualified as her Administrator.

(2) By Indenture of January 26, 1877, by and between Hetty Sullivan Lawrence (subsequently Cunningham), Amos A. Lawrence and Francis W. Lawrence, said Hetty conveyed property to said Amos and Francis upon the trusts of said Indenture, a copy of which is hereto attached, made a part hereof and marked "A". Said Indenture in brief provided that the income should be paid to said Hetty during her life, and from and after her death the income should be paid to and among such of her children as should be living at the time of payment, in equal shares. Said Hetty left four children, the individual Petitioners, and [fol. 7] the Respondent determined the Succession and Legacy Tax upon their present interests to amount to $709.63, and in accordance with the provisions of Chapter 65 of the General Laws certified said amount to the Trustees under said Indenture, and said amount with interest amounting to $7.10 was paid by them October 20, 1932.

(3) By agreement dated in 1862, Amos A. Lawrence entered into agreement with the Massachusetts Hospital Life Insurance Company by which he deposited with said Company a sum of money, the income to be paid to Hetty Sullivan Lawrence Cunningham during her life, and after her death to her Executors or Administrators In Trust and for the special use and benefit of such person or persons as the said Hetty may appoint by her last Will and Testament made by her while unmarried, or any instrument in the nature of a last Will and Testament made by her while a married woman—in failure of such appointment then to be distributed by said Administrators among her children, if she should have any, the issue of a deceased child to have the same share their parent would have been entitled to. The Respondent certified to Frederic Cunningham, [fol. 8] Administrator of the Estate of said Hetty Sullivan

Lawrence Cunningham, a tax in full upon the failure to exercise the power of appointment, amounting to $830.65, which sum together with interest amounting to $.55 was paid by him September 21, 1932.

(4) Said Hetty Sullivan Lawrence Cunningham had under the Will of Sarah E. Lawrence, who died May 27, 1891, and which Will was duly proved and allowed by the Probate Court for the County of Norfolk, July 1, 1891, and a copy of which Will is hereto attached, made a part hereof and marked "B", a life interest with a special testamentary power of appointment among her issue, which power she did not exercise, and the property in which she had such an interest passed, therefore, under the terms of the Will of said Sarah E. Lawrence in equal shares to the four children of said Hetty Sullivan Lawrence Cunningham, namely—Harriet C. Binney, Constance C. Pertzoff, Frederic Cunningham and Susannah C. Coolidge, for their respective lives and after their deaths for others. The Respondent certified to the Trustees under the Will of Sarah E. Lawrence taxes upon the life interest of said four children in said property as follows:

[fol. 9] To Harriet C. Binney $714.50
To Constance C. Pertzoff 717.53
To Frederic Cunningham 720.55
To Susannah C. Coolidge 723.58

they being respectively 46, 45, 43 and 41 years of age. Said taxes were paid by the Trustees February 3, 1933. All and each of said taxes are illegal and excessive, and the imposition of them and each of them is in violation of the Constitution of the Commonwealth of Massachusetts and of the Constitution of the United States of America, in that they deprive the Petitioners of their property without due process of law and of the equal protection of the laws.

Wherefore the Petitioners pray that this Court will determine—

(1) that said taxes and each of them are illegal and excessive and should be abated in whole; and

(2) for such other and further orders and directions as to this Court shall seem meet.

By their Attorney, Charles M. Rogerson.

[fol. 10] EXHIBIT "A" TO PETITION

This Indenture of two parts made this twenty-sixth day of January in the year eighteen hundred and seventy-seven by and between Hetty Sullivan Lawrence, of Brookline, in the County of Norfolk and Commonwealth of Massachusetts, Spinster, party of the First Part, and Amos A. Lawrence, Merchant, and Francis W. Lawrence, Gentleman, both of said Brookline, party of the Second Part, Witnesseth, that whereas the said Hetty hath by her deed of even date herewith granted and conveyed to the said Amos and Francis a parcel of land, with the buildings thereon, lying on Monmouth Place in said Brookline (reference being made to the said deed for a particular description of the said land) to hold the same to them, their heirs and assigns, upon certain trusts declared in an Indenture of even date with said deed; Now, therefore, we the several parties hereto, hereby declare that this instrument is the indenture named in the said deed and that the said trusts are the following and no other, to wit: To hold the granted premises, or, at their discretion, to sell the same, or any part, or parts, thereof, and invest the proceeds in such real or personal property as they may deem safe and advantageous, and so again, and whenever they may deem it for the [fol. 11] advantage of the trust property to vary investments and to sell any substituted property at any time held upon these trusts and reinvest the proceeds, making in all cases, suitable deeds and transfers. To collect the rents and income of said trust-property, original and substituted, and after deducting therefrom the expense of taxes, insurance, and repairs, and all other necessary and proper charges and expenses, including a reasonable compensation for their own services, to pay the remaining, or nett, rents and income, by quarter-yearly payments to the said Hetty Sullivan Lawrence, in every year during her natural life, either into her own hand or upon her order or receipt in writing, given at or after the time, to her sole and separate use, free from all marital claim or right, and not by anticipation, or in compliance with any assignment. And from and after the death of the said Hetty, to pay the said nett rents and income, by quarter-yearly payments, to and among such of the children of the said Hetty as may be liv-

ing at the time of payment, in equal shares, and to the lawful issue, then living, of any *her* child then deceased, such issue taking by representation the share which such deceased child would have taken had he or she been living, until the expiration of twenty years next succeeding the death of the said Hetty; and upon the expiration of the [fol. 12] said twenty years, to convey in fee simple and transfer the said trust-property, original and substituted, in equal shares, to and among the children, then living, of the said Hetty, and the lawful issue, then living, if any, her child then deceased, such issue taking, by representation, the share which such child would have taken had he or she been living. If at the death of the said Hetty, or at any time during the said twenty years next thereafter, no child or lawful issue of the said Hetty be living, the trustees shall convey in fee simple and transfer the said trust-property, real, personal, and mixed, whether original or substituted, to the heirs at law of the said Amos A. Lawrence, if he have then deceased, and if he have not then deceased, to the heirs at law of the said Hetty. If either of the Trustees herein named dies, resigns, or from any cause ceases to be a trustee, the surviving, or remaining, trustee shall appoint in writing a new trustee, and make the necessary conveyances and transfers to him; and in case such vacancy is not so filled within thirty days next after it occurs, or in case both the said Amos and Francis cease to be trustees, such appointment of a new trustee shall be made by the Probate Court for said Norfolk. Every power herein given to a Trustee herein named is [fol. 13] given to a substituted trustee, and in the event of a vacancy, the surviving or remaining trustee for the time being shall have every power that the two trustees would have. Each trustee, whether original or substituted, shall be liable only for his own receipts, payments, and wilful defaults, and not one for another; and upon all sales by the Trustees, their receipts shall exempt the purchaser from all concern as to the application of the purchase-money. And the said Amos A. Lawrence and Francis W. Lawrence hereby accept the said trust, and covenant with the said Hetty Sullivan Lawrence faithfully to discharge the same. In Witness Whereof the said parties of the First and Sec-

ond Parts have hereunto set their hands and seals on the day and year first above written.

Hetty S. Lawrence. (Seal.) Amos A. Lawrence. (Seal.) Francis W. Lawrence. (Seal.)

Executed and delivered in presence of Harriett D. Lawrence, Ida H. Whittemore to F. W. L., Lucius M. Sargent H. S. L.

COMMONWEALTH OF MASSACHUSETTS,
Norfolk, ss:

26th March, 1877.

Then personally appeared the above named Hetty Sullivan Lawrence, and acknowledged the foregoing instrument to be her free act and deed;

Before me,

Lucius M. Sargent, Justice of the Peace.

[fol. 14] A true copy of Indenture recorded with Norfolk Co. Deeds Mar. 26, 1877 in Liber 488 Fol. 107.

Attest: J. S. Burdakin, Reg.

[fol. 15] EXHIBIT "B" TO PETITION

I, Sarah E. Lawrence, of Brookline, in the County of Norfolk, widow, make this my last Will, hereby revoking all wills by me at any time heretofore made.

First. I appoint my two sons, Amory Appleton Lawrence and William Lawrence, the executors of my will, and I request that neither of them be required to give any surety on his bond.

Second. I give to those of my children who survive me, in equal shares, all my silver plate, furniture, books, pictures, jewels, watches, clothes, horses, carriages and all other like articles of personal or domestic use or ornament.

Third. All the residue of my property, real and personal, and all the property over which at the time of my death I may have any power of testamentary appointment, I give and appoint to such of the following persons as are living at my death, namely; my said sons, Amory Appleton Lawrence and William Lawrence, and my sons-in-law, Peter C.

Brooks, William Caleb Loring, Frederick Cunningham and Augustus Hemenway, to hold the same to them, their heirs and assigns, upon the following trusts:

In the first place to set apart out of said residue of my property, but not out of the property over which I may have a power of appointment, real or personal property, or both, of the value of seven hundred and fifty thousand dollars, my trustees making the selection and valuation thereof according to their best judgment, and to hold the said property so set apart, and all property which may be substituted therefor, and to accumulate and add to the capital the net income thereof for the period ending with the death of the longest liver of my children living at the date of this Will, subject to the following provisions, that is to say:

If at my death any of my grandchildren other than my [fol. 16] grandchild Alice Amory, the daughter of my deceased daughter Marianne Appleton Amory, are living and have attained the age of twenty-one years, to set apart property, real or personal, or both, valued by my trustees at Fifty thousand dollars, for each of such grandchildren and to pay to him or her the net income thereof, quarter-yearly in every year during his or her life and upon his or her death to convey in fee, transfer and pay over the last named trust property, original and substituted, to or for the benefit of such persons, in such manner and on such terms, as he or she shall appoint by will, and in default of appointment, to those persons who shall then be his or her heirs by blood, according to the then law of Massachusetts; and whenever during the period aforesaid any one of my grandchildren, who was in being at my death, but who had not then attained the age of twenty-one years, shall attain that age, to set apart property, real or personal, or both, valued by my trustees at Fifty thousand dollars, and to pay to him or her the net income thereof quarter-yearly in every year during his or her life, and upon his or her death to convey in fee, transfer and pay over the last named trust property, original and substituted, to or for the benefit of such persons, in such manner and on such terms as he or she shall appoint by will, and in default of appointment to those persons who shall then be his or her heirs by blood according to the then law of Massachusetts; and whenever during the period aforesaid, any one of my grandchildren who was

not in being at my death, shall attain the age of twenty-one years, to pay to him or her Fifty thousand dollars, or to convey in fee simple and transfer to him or her property, real or personal, or both, valued by my trustees at Fifty thousand dollars. And upon the death of the longest liver of my said children living at the date of this Will, namely: Amory Appleton Lawrence, William Lawrence, Sarah Lawrence Brooks, Susan Mason Loring, Hetty Sullivan Cunningham, and Harriet Dexter Hemenway, to pay to every [fol. 17] one of my grandchildren, then living, who has not then attained the age of twenty-one years, Fifty thousand dollars, or to convey and transfer to him or her property, real or personal, or both, valued by my trustees at Fifty thousand dollars. If the said trust property with its accumulations at the end of said period be not sufficient to provide the said money or property for every one of my grandchildren who is then less than twenty-one years old, then to divide the said accumulated trust property, or so much thereof as remains, equally among such grandchildren.

And if after making such payments of Fifty thousand dollars, or transferring property of that value, at the end of said period to or for the benefit of my grandchildren who have not then reached the age of twenty-one years, there remains a surplus of said trust property, then to divide, distribute and convey such surplus of property in equal shares to and among all my grandchildren (including my said grandchild Alice Amory) then living, and the issue, then living, of every one of my said grandchildren (including my said grandchild Alice Amory) then deceased, such issue of every deceased grandchild taking one share according to the stocks. As I cannot foretell the number of my grandchildren, the provision which I wish to make for all of them may prove inadequate. But my will is that every grandchild who attains the said age before the death of the longest liver of my said children living at the date of this Will, shall, in order of age, receive or have the benefit of, as aforesaid, the full sum of Fifty thousand dollars, or property of that value, so long as the accumulated trust property suffices therefor, although my grandchild, or grandchildren who subsequently attain that age thereby fail to receive any benefit from my intended bounty. The words grandchild and grandchildren shall be taken to mean

the child or children of my children, and not my great-[fol. 18] grandchildren or remoter issue. But if at the death of the survivor of my said children living at the date of this Will, all my issue are extinct, then upon the death of such survivor to convey in fee simple, transfer and pay over so much of the said accumulated trust property as remains undistributed to those who shall then be my heirs by blood according to the then law of Massachusetts.

In the second place, whereas I have excluded my said grandchild, Alice Amory, from the benefits of the fund hereinbefore provided for my grandchildren (except so far as she or her issue may share in any surplus at the final distribution of the fund as is above set forth) for the reason that I have provided or intended to provide for her in my lifetime, and whereas I have hitherto placed for her in trust the sum of Fifteen thousand dollars and am at present intending to place in trust for her Thirty-five thousand dollars more, but for certain reasons have delayed so to do, now, if at my death I shall not have placed in trust for said Alice, or shall not have conveyed to her in her own right said remaining sum of Thirty-five thousand dollars, then, if said Alice or any of her issue are living at my death, I direct my trustees to set apart out of the said residue of my property, but not out of the property over which I may have power of appointment, the sum of Thirty-five thousand dollars, together with interest thereon at the rate of five per cent, from the eighth day of May, 1886, to the day of my death, and to pay the said interest to the said Alice, or, if she be then deceased, leaving issue then living, to such issue according to the stocks, and to hold the said sum of Thirty-five thousand dollars in trust, if said Alice be living at my death, to pay the net income of the said sum and of all substituted property to the said Alice Amory by quarter-yearly payments in every year during her life, and upon her death to convey in fee, transfer and pay over the said [fol. 19] trust property, original and substituted, to or for the benefit of such persons, in such manner and on such terms, as she shall by will appoint, and in default of appointment to those persons who shall then be her heirs by blood according to the then laws of Massachusetts; but if said Alice shall have died before me leaving issue and any of her issue are living at my death, to pay said sum of

Thirty-five thousand dollars to those of said issue who are living at my death according to the stocks.

And in the third place, If my said grandchild, Alice Amory, or any of her issue survive me, to estimate, according to the best judgment of my trustees, in the first place, the value of all the residue aforesaid of my property, after deducting the sums herein directed to be set apart, and also in the second place the value of all the property over which at the time of my death I may have any power of testamentary appointment, and then to set apart property, real or personal, or both, equal in amount to one-fourteenth of the sum of the said two values, my trustees making the selection and valuation thereof according to their best judgment, but said property (though estimated on the sum of the said two values as aforesaid) shall be taken only from my property and not from the property over which I may have a power of appointment, and to pay the net income of said property, so set apart, and of all substituted property, to the said Alice by quarter-yearly payments in every year during her life, and upon her death to convey in fee simple, transfer and pay over the said trust property, original and substituted, to or for the benefit of such of her issue, in such manner and on such terms as she shall by will appoint, and in default of such appointment to her issue then living, such issue taking by the stocks, and in default both of such appointment and of such issue, to those persons who shall [fol. 20] then be my heirs by blood according to the then law of Massachusetts, but if said Alice shall have died before me, then to convey in fee simple, transfer and pay over the said property so set apart, to her issue, according to the stocks. This provision for my said grandchild Alice is intended to give her substantially an equal interest with my other grandchildren, according to my best judgment at present, although I am well aware that owing to the impossibility of foreseeing the future, she may in the end enjoy less or more than they.

And in the fourth place. As to what remains of the property given and appointed to my trustees as aforesaid, after setting apart the funds and trust-properties above provided, to pay the net income thereof, and of all substituted property, quarter-yearly to such of my six children living at the date of this Will as shall be living at the time of payment, in equal shares, and to the issue then living, of every

one of my said six children then deceased, (such issue of every deceased child taking one share according to the stocks) in every year, until the death of the longest liver of my said six children, and from and after the death of such longest liver, during the twenty years next ensuing upon such death, to pay the said net income quarter-yearly to my grandchildren, living at the time of payment, excluding my said grandchild Alice Amory, making the division per capita and not according to the stocks, the issue then living of every one of my grandchildren then deceased (excluding my said grandchild Alice Amory) taking (according to the stocks and not per capita) the share which such my deceased grandchild would have taken, if living. And upon the expiration of the said twenty years, to convey in fee simple, transfer and pay over the said trust property, and all substituted property, to the children of my said six children, they taking per capita and not according to the stocks, the issue then living of every such grandchild of [fol. 21] mine who has then deceased, taking according to the stocks and not per capita the share which such deceased grandchild would have taken if living.

Provided however, that any one of my said six children may by his or her will, appoint the shares in which that part of the net income which is hereinbefore given to his or her children, living at the time of payment, and to the issue then living, of any such child then deceased, shall be apportioned among such children and issue, during the time between his or her death and the time fixed for the distribution of the trust property; and also the proportions in which that part of the trust property and fund which is hereinbefore given, in such final distribution, to his or her children, then living, and the issue then living of his or her children then deceased shall be divided among such children and issue, but this proviso respecting income is subject always to the discretionary power hereinafter given to my trustees. If at the death of the last survivor of my said six children, or at any time during the twenty years next ensuing upon his or her death, no issue of any of my said six children are living, then upon the death of the longest liver of such six children and their issue to convey in fee simple, transfer and pay over the said trust fund and property to those persons who shall then be my heirs by blood, according to the then law of Massachusetts. It is provided al-

ways as to every one of the trusts hereby declared, and during the continuance of the same that if, for the reason that any child or descendant of mine is insolvent or (in the opinion of my trustees) is reckless, extravagant, or of bad morals, or if for any other reason which is satisfactory to my trustees, my trustees deem that the interest of such child or descendant, will be promoted by withholding the share of net income to which such child or descendant is entitled, then they may withhold the same, or any part [fol. 22] thereof, and in that event they shall apply the same at their discretion to the maintenance and support of the wife and children of such my son or male descendant, or of the husband and children of such my daughter or female descendant, or of one or more of them to the exclusion of the others, in such proportions as my trustees shall deem best, or to the education of the children of such my child or descendant, or of any one or more of such children to the exclusion of the others, or they may accumulate the said share of net income and add the same to the trust fund and property, or they may apply a part of the said share of net income to one or more of these purposes; and this they may do as often and so long as they deem it expedient, exercising their best judgment and discretion.

Fourth. I empower my trustees to retain any property in the same state of investment in which they may receive the same, notwithstanding such investment is a wasting investment or would not be sanctioned by a court of equity, or to sell and convey any of the said trust property, and to reinvest the proceeds of such sales according to their best judgment, and so again and whenever they may deem it expedient, to vary investment, both of original and substituted property, to change real estate into personal estate, and personal estate into real estate, making sales by public auction or private contract, without the aid of any court.

All payments to married women shall be to their sole and separate use, without any power of anticipation on their part, and free from the control of any husband. If any stock, bonds or other securities are retained or bought by my trustees at a premium above the par value, or are wasting securities, the trustees may, should they see fit so to do, regard the whole of the interest or dividends received on [fol. 23] such securities as income, and generally, what expenses, commissions and charges should be charged to in-

come and what to capital, and what sums or property received shall be deemed capital and what income, shall be determined by my trustees, the opinion of whom, or of a majority of whom, made in good faith shall be conclusive. The words "my trustees' in this Will shall be taken to mean the trustees for the time being, whether original or substituted. If any person herein named as trustee fails to become a trustee, or if any one of my trustees ceases by death, resignation, removal or otherwise to be a trustee, the remaining trustees, or a majority of them, may in writing oppoint a successor or successors to fill such vacancy, and the number of trustees shall not be permanently reduced below three. But if such vacancy or vacancies be not filled, as aforesaid, so that the number of trustees is reduced below three, then at the expiration of six months next after the same may occur the same shall be filled and a new trustee or trustees be appointed by the Court having jurisdiction for that purpose. But notwithstanding any vacancy or vacancies exist the surviving or remaining trustees shall have all the powers and authorities herein given to all my trustees. A majority of my trustees, for the time being, shall have power to act in all cases of making or changing investments, and to act as to all payments, receipts, dividends and partitions under this Will, and as to all sales, conveyances and transfers of real or personal property. No bond shall be required of any trustee herein appointed, or of any other or future trustee, unless the Court having jurisdiction *of my Will, upon the petition of* some person interested, and upon cause shown, deems it necessary that such a bond shall be given. Every one of my trustees shall be severally, and not jointly, liable for his own receipts, payments and wilful defaults, and not for [fol. 24] those of any other trustee, unless done or suffered with his express assent, and no trustee shall be liable save for his own wilful default, nor shall he be liable for allowing the trust securities and moneys to be in the custody, possession or control of one or more of his co-trustees. Upon all sales by my trustees the purchasers shall not be concerned to see to the application of the purchase money. In making any distribution of any trust fund and any division and conveyance of any trust property, I authorize my trustees to appraise and set apart in such manner as they may deem just and to convey in fee simple and trans-

fer to the persons entitled to a share or portion thereof, so much of the said trust property, real and personal, or either, as my trustees may deem equal in value to such share or portion or if they deem it expedient, they are authorized to sell by public or private sale, without the aid of any Court, and to convey and transfer sufficient of the said trust property to enable them to pay in money what they shall deem to be the just value of such share or portion, and they may pay the same accordingly; or they may make such distribution, partly in the proceedings of such sales, and partly in other property, real or personal. If any person herein named as an executor or trustee refuses such trust, his right to any devise, legacy or advantage under this Will shall not be thereby affected or impaired.

The words "child," "children," "issue" and "heirs," in this my Will shall be taken to mean, child, children, issue and heirs by blood, and not by adoption, and no person claiming by, under or through an adoption, shall in any event be considered as of kin to me.

In witness whereof I, the above named Sarah E. Lawrence have hereunto set my hand and seal, this thirtieth day of December in the year One thousand eight hundred and eighty-six.

Sarah E. Lawrence. (Seal.)

[fol. 25] Signed, sealed, published and declared by the said Sarah E. Lawrence, as her last Will, in the presence of us, who at her request, in her presence, and in the presence of each other have hereto set our names as witnesses.

Edwd. S. Grew. Arthur T. Kidder. Arthur Onthank.

[fol. 25½] I, Sarah E. Lawrence of Brookline in the County of Norfolk, widow, make this Codicil to my last Will, which will is dated December 30, 1886.

First. To my sons, if they survive me, or if only one survives me then to such one I give the sum of One hundred thousand dollars. I shall be pleased, if my sons or son see fit, to have them or him make out of said sum any payments which I may by any memorandum request, and to pay any balance to my residuary legatees upon the trusts in my said will created. But I expressly declare that I do not hereby intend to create any trust, and I declare that no person or corporation shall have any claim legal or

equitable or by way of resulting trust or otherwise against my said sons or son in whose discretion it shall rest to make or not to make any or all such payments.

Second. Whereas, by my said will, I have directed as to the residue of my estate that in the first place property of the value of Seven hundred and fifty thousand dollars shall be set apart to be held subject to certain provisions for the benefit of my grandchildren, and whereas my granddaughter Alice Amory was excluded from the benefit of said property except as to a certain possible surplus, now therefore I exclude also from the benefit of said property my grandchildren Lawrence Brooks and Eleanor Brooks, children of my daughter Sarah Lawrence Brooks in the same manner and only in the same manner, that is, with the same exceptions for them and their respective issue, as the said Alice Amory is now excluded.

Third. Whereas by my said will I have directed as to the residue of my estate in the second place that certain provisions shall be made for the said Alice Amory, I now hereby revoke those directions as to the said residue which are indicated by my said will as being in the second place and substitute therefor as follows: "In the second place whereas I have excluded my said grandchildren Alice Amory, Lawrence Brooks and Eleanor Brooks from the benefit of the fund hereinbefore provided for my grandchildren, except so far as they or their issue may share in any surplus at the final distribution of the fund as is above [fol. 26] set forth, for the reason that I have provided or intend to provide for them in my lifetime, and whereas I have hitherto given or placed in trust for each of them the sum of Fifteen thousand dollars, and am at present intending to place in trust for or give to each of them the further sum of Thirty-five thousand dollars, but for certain reasons have delayed so to do; now if at my death I shall not have placed in trust for or given to all of said three grandchildren said remaining sums of Thirty-five thousand dollars, then as to any one of said three grandchildren for or to whom said sum of Thirty-five thousand dollars has not been placed in trust or given by me, if such grandchild or his or her issue is or are living at my death, I direct my trustees to set apart out of the said residue of my property, but not out of the property over which I may have

a power of appointment, for such grandchild the sum of Thirty-five thousand dollars, together with interest thereon at the rate of four per cent from the time when such grandchild became of age to the day of my death, to pay the said interest to such grandchild, or if he or she be then dead leaving issue then living, to such issue according to the stocks and to hold the said sum of Thirty-five thousand dollars in trust if such grandchild be living at my death to pay the net income of the said sum and of all substituted property to such grandchild by quarter-yearly payments in every year during his or her life, and upon his or her death to convey in fee transfer and pay over the said trust property original and substituted to or for the benefit of such persons, in such manner and on such terms as he or she shall by will appoint and in default of appointment to those persons who shall then be his or her heirs by blood, according to the then laws of Massachusetts, but if such grandchild shall have died before me leaving issue and any of his or her issue are living at my death to pay said sum of Thirty-five thousand dollars to those of said issue who are living at my death according to the stocks."

Fourth. In all other respects, I confirm my said will.

[fol. 27] In witness whereof I, the said Sarah E. Lawrence have hereunto set my hand and seal, this 31st. day of March in the year one thousand eight hundred and ninety.

Sarah E. Lawrence. (Seal.)

Signed, sealed, published and declared by the above named Sarah E. Lawrence, as and for a Codicil to her last Will in the presence of us, who at her request, in her presence and in the presence of each other have hereto set our names as witnesses.

Susan C. Lawrence. Catherine M. Hichborn. Harriet L. Hichborn.

[Endorsed:] 28,100. Lawrence, Sarah E. Will. Filed June 9, 1891. Ret. 1 W. July 1891. Allowed July 1, 1891. 167/60.

[fol. 28] Citation, in usual form, showing service on Respondent, omitted in printing.

Appearance of counsel for respondent, filed Dec. 11, 1933, omitted in printing.

[File endorsement omitted.]

[fol. 29] In Probate Court of Norfolk County

In Equity

[Title omitted]

Agreed Statement of Facts—December 17, 1934

The parties hereto stipulate and agree that, for the purposes of this case only, the following facts are true and are all the facts material to the case.

(1) Hetty Sullivan Lawrence Cunningham, late of Brookline, Norfolk County, died August 20, 1931, intestate, leaving as her sole heirs-at-law four children, namely the petitioners, Harriet C. Binney, Constance C. Pertzoff, Susannah C. Coolidge and Frederic Cunningham. Said Frederic Cunningham is the duly appointed and qualified administrator of her estate. The net amount of her estate was $299,241.58 upon which was paid a tax as follows: 1% on $100,000, 2% on $100,000, and 4% on $99,241.58.

(2) Said Hetty by indenture dated January 26, 1877, a copy of which is annexed to the petition marked "A" which copy is a true copy of the indenture, conveyed certain property to Amos A. Lawrence and Francis W. Lawrence as trustees to whom the petitioners Frederic Cunningham and George S. Parker are successor trustees upon the trusts set forth therein.

(3) After the death of said Hetty the respondent deter-
[fol. 30] mined the value of the several life interests passing under said indenture to her children as follows: Harriet C. Binney $4,366.92; Constance C. Pertzoff $4,403.31; Frederic Cunningham $4,457.90; and Susannah C. Coolidge $4,512.48. On each of the interests the respondent exacted

a succession tax of 4%, totalling $709.63, which amount together with interest of $7.10 was paid by the trustees to the Commonwealth on October 20, 1932. Since the interest passing to each child under this indenture is less than $10,000 it is not subject to any tax imposed by General Laws, Chapter 65 unless grouped with another or other interests which with this one aggregate $10,000 or more.

(4) In 1862 Amos A. Lawrence deposited with the Massachusetts Hospital Life Insurance Company $7,947.33 under a contract, a copy of which is hereto annexed marked "C" which copy is a true copy of said contract.

In accordance with the provisions thereof income was accumulated during the minority of Hetty until December 31, 1875 when the increased principal amounted to $18,016.45 and was accumulated thereafter until December 31, 1877 when the increased principal amounted to $20,046.58.

(5) After the death of said Hetty the respondent determined the value of the interests passing to her said children under said contract because of her failure to exercise the power of appointment of the said fund held by the Massachusetts Hospital Life Insurance Company at a total of $20,766.20. On this last mentioned sum the Commissioner exacted a succession tax of $830.65 or 4% which amount together with interest of $.55 was paid by her administrator to the Commonwealth on September 21, 1932.

The value of the interest passing to each child under this contract is one-fourth of $20,766.20 or $5,191.55. Since this [fol. 31] sum is less than $10,000 it is not subject to any tax imposed by General Laws, Chapter 65 unless grouped with another or other interests which with this one aggregate $10,000 or more.

(6) The Will of Sarah E. Lawrence who died May 27, 1891 was proved and allowed by the Probate Court for Norfolk County on July 1, 1891, a copy of which Will is annexed to the petition marked "B" which copy is a true copy of said Will. The petitioners William Lawrence, John S. Lawrence, Leverett Saltonstall and Augustus Hemenway are trustees under the said Will of Sarah E. Lawrence.

(7) Said Hetty Sullivan Lawrence Cunningham did not exercise the special testamentary power of appointment

given her by said Will of Sarah E. Lawrence. After the death of said Hetty the respondent determined the value of the several life interests passing to her children by said Will in default of appointment as follows: Harriet C. Binney $17,862.46; Constance C. Pertzoff $17,938.15; Frederic Cunningham $18,013.80; and Susannah C. Coolidge $18,089.53.

On each of these interests the respondent certified to the Trustees under the Will of Sarah E. Lawrence and exacted a succession tax of 4%, totaling $2,876.16, which amount, together with interest of $65.67, was paid by the Trustees to the Commonwealth on February 3, 1933. Since the interest passing to each child under this will is in excess of $10,000 but less than $25,000 the rate of tax to which it is subject under General Laws, Chapter 65 is 1% unless such interest is grouped with another or other interests which together aggregate $25,000 in which case the higher rates apply.

Charles M. Rogerson, Attorney for Plaintiffs. John L. Hurley, Asst. Atty. Gen. for Respondent.

[fols. 32-34] Exhibit "A" to agreed statement of facts omitted. Printed side page 10, ante.

[fol. 35] Exhibit "C" to Agreed Statement of Facts

Annuity in Trust

The Massachusetts Hospital Life Insurance Company, in consideration of the Principal Sum of Seven thousand nine hundred and forty seven dollars and thirty three cents, received by them of Amos A. Lawrence of Boston in the State of Massachusetts in trust as hereafter mentioned, the receipt whereof is hereby acknowledged. Do hereby promise and agree to and with the said Amos, his executors and administrators, that the said Company shall and will invest the same in Bank or other Stock, or in Real Estate, or place the same out at interest on mortgage or other security at the discretion of the Directors; and that the said Company shall and will yearly and every year during the

natural life of Hetty Sullivan Lawrence of Boston in the State of Masschusetts (daughter of said Amos) pay, or cause to be paid to the said Hetty in yearly payments on the first days of January, in each and every year, during the natural life of the said Hetty (unless added to the principal Sum as provided below) (upon her separate order and receipt, to be dated on, or subsequent to, the several days on which the said several payments shall fall due; for her separate use, free from the debts, control, or interference of any husband she now has, or may hereafter have; which Annuity and Principal Sum are both hereby declared to be inalienable by the respective grantees thereof,) the first payment to be made on the first day of January next, the same rate of interest on said Principal Sum as the said Company shall actually make and receive upon their Capital Stock paid in, and the other property in their possession, including Real Estate, Stocks of the United States, Bank or other Stock, Notes, Bonds, and Mortgages, after deducting all necessary expenses and charges (excepting Office rent and the salaries of the Com- [fol. 36] pany's officers and servants) and all actual losses by bad debts or otherwise, not arising from the actual fault of the Company or their servants, and also half of one per centum per annum for the expenses of their Office, and the labor, trouble and responsibility of investing, taking care of, and managing said Trust Property. The said Principal Sum received of said Amos to be invested and managed, and the amount of the income thereof to be estimated, ascertained and determined by the Directors of said Company, in the way and manner provided in the extract from the article on Annuities in Trust, printed at the bottom.

Interest to commence November 24, 1862.

And the said Company, for the consideration aforesaid, further promise and agree to and with the said Amos, his executors and administrators, that, in sixty days after proof of the decease of the said Hetty they will assign, transfer, and pay the amount of the aforesaid Principal Sum, (or such part thereof as shall not have been lost by bad debts or otherwise, without the actual fault of said Company or their servants) and all interest then due thereon at the time of her death, in Real Estate, Stocks, Notes, Bonds and Mortgages belonging to said Company,

all, any, or either of them, at the pleasure and discretion of the Directors, at the prices at which the same respectively shall stand charged in the Books of the Company at the decease of said Hetty, in the way and manner provided in said Extract from said Article, to her Executors or Administrators in trust, and for the special use and benefit of such person or persons as the said Hetty may appoint by her last will and testament made by her while [fol. 37] unmarried, or by any instrument in the nature of a last will and testament made by her while a married woman. In failure of such appointment then to be distributed by said Administrators among her children, if she should leave any, (the issue of a deceased child to have the same share their parent would have been entitled to.)

In failure of such apppintment and of issue then to be distributed by said Administrators according to law.

It is agreed that the said Hetty when of age, and during her minority her Father or Guardian, shall have liberty to have one or more of said annual payments added to said principal Sum (in order to increase said principal Sum) giving the Company notice of their intention at least sixty days before the annual time of paying said interest.

The receipt of said Executors or Administrators to be a full discharge to said Company, which shall not in any event, be responsible for the application of said money by said Executors or Administrators.

In Witness Whereof, the said Massachusetts Hospital Life Insurance Company have, by their Actuary and Secretary duly empowered for this purpose, signed and delivered this Contract, this twenty fourth day of July one thousand eight hundred and sixty two.

(S.) Moses L. Hale, Secretary. (S.) Charles J. Loring, Actuary.

[fol. 38] In Probate Court of Norfolk County

[Title omitted]

Amendment to Agreed Statement of Facts—February 19, 1935

The parties to the above entitled action agree that the following facts are true and, if material, may be considered

by the Court in addition to the facts appearing in the Agreed Statement of Facts heretofore filed:

Hetty Sullivan Lawrence Cunningham had five (5) children: Harriet C. Binney who was born June 27, 1885, Constance C. Pertzoff who was born September 8, 1886, Frederic Cunningham who was born December 28, 1888 and Susannah C. Coolidge who was born March 19, 1890. These four (4) children are now living. Lawrence Cunningham was born December 29, 1892 and died in 1923, without issue.

The Plaintiffs, by Charles M. Rogerson, Their Attorney. The Defendant, by Charles F. Lovejoy, Ass't Attorney General.

[Endorsed:] February 20, 1935. Amendment allowed. Joseph R. McCoole, Judge of Probate Court.

[fol. 39] In Probate Court of Norfolk County

[Title omitted]

Reservation

This case came on to be heard before me and at the request of the parties I now reserve and report the said case upon the pleadings and the agreed statement of facts for the determination of the full court.

Joseph R. McCoole, Justice of the Probate Court.

February 20, 1935.

[fol. 40] In Supreme-Judicial Court of Massachusetts

Rescript—January 2, 1936

In The Case of

Harriet C. Binney et als.

vs.

Commissioner of Corporations and Taxation

Pending in the Probate Court for the County of Norfolk

Ordered, that the register of probate and insolvency in said county make the following entry under said case in the docket of said court; viz.,—

Petition denied.

By the Court, Walter F. Frederick, Clerk.

January 2, 1936.

Over

[fols. 41 & 42] Brief Statement of the Grounds and Reasons of the Decision

The reasons of the decision are set forth at length in the opinion, filed with the reporter of decisions, to which reference is made.

[fol. 42a] IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

HARRIET C. BINNEY & Others

vs.

COMMISSIONER OF CORPORATIONS AND TAXATION

NORFOLK:

Argued May 15, 1935

Present: Rugg, C. J., Pierce, Donahue, Lummus, & Qua, JJ.

Tax, On legacies and successions. Devise and Legacy, Time of vesting, Remainder, Power. Trust, Construction of instrument creating trust, Time of vesting, Remainder, Power. Constitutional Law, Equal protection of the law

Reservation and report by McCoole, J., of a petition in the Probate Court for the county of Norfolk for the abatement of certain taxes.

OPINION—Filed January 7, 1936

RUGG, C. J.:

This is a petition brought in the Probate Court for the abatement of certain inheritance taxes assessed with respect to the estate of Hetty S. L. Cunningham, late of Brookline in this Commonwealth. G. L. (Ter. Ed.) c. 65, § 27. The case has been reserved without decision for our determination upon the pleadings and an agreed statement of facts. Mrs. Cunningham died intestate in August, 1931, leaving as her sole heirs at law four children born in 1885, 1886, 1888 and 1890, who are the petitioners. The net amount of her own estate was $299,241.58. No question arises concerning the inheritance tax on that estate. At her death, each of her children also took interests in property held under three different trusts. All these interests have by the respondent been united with the interest in the estate of the intestate for the purpose of determining the tax. The petitioners contend that these interests under the [fol. 42b] several trusts cannot be so united. If that contention be sound, two of them are not taxable because not

sufficient in amount, and the third must be taxed at a lower rate. The petitioners further contend that, apart from any question of uniting the interests, two of these trust interests are not of a nature taxable under the statute. The three trusts are as follows:

(1) In 1877, the intestate created a trust. Its pertinent terms were these: She reserved to herself only a life estate of the net income but no power to revoke, alter, or amend. From and after her death, for twenty years, the net income was payable by quarter-yearly payments in equal shares "to and among such of" her children as "may be living at the time of payment," living issue of a deceased child to take by right of representation. At the expiration of the twenty years after the death of the intestate, the trustees were to make division of the principal of the trust equally among her children then living, the issue of any deceased to take by right of representation with the provision that, if at her death or at any time during the twenty years next thereafter no child or issue of the intestate should be living, the trustees should transfer the principal of the trust to the heirs at law of her father if he then were deceased; otherwise, to her own heirs at law. No one of the interests passing to the petitioners under this trust was large enough to be taxable by itself; such interest was taxable only by uniting it with other interests.

(2) In 1862, Amos A. Lawrence, the father of the intestate, created a trust for her benefit, which was accumulated until 1877, and thereafter the income was paid to her during her life. At her death, the principal and unpaid income were to be distributed to such persons as she might by will appoint and, in default of appointment, to her surviving children. No one of these shares, thus passing directly to each of the four children of the intestate on her death in default of appointment, was large enough to be taxed by itself; such share is not taxable unless united.

(3) Each of the four children of the intestate succeeded on her death to an interest in a trust established under [fol. 42c] the will of her mother, Sarah E. Lawrence, who died in 1891. Property was thereby left to pay the income to each of her six children, two of whom are now living, and to the issue per stirpes of any such child deceased, so long as any of the six children should live; and for twenty years

after the death of the last survivor, the income was to be paid to the grandchildren and to their issue per stirpes. The will then provided that each child by will might "appoint the shares in which" the income given to his or her children and issue "shall be apportioned among such children and issue," and might also appoint the proportions in which the principal given to such children and issue "shall be divided among such children and issue." The intestate did not exercise the special testamentary power of appointment given her under the will of her mother. The value of each of the several life interests passing to each of her children in default of such appointment is approximately $18,000. No one of these interests by itself is subject to a tax in excess of one per cent, but by uniting it with other interests the rate would be four per cent.

Briefly stated, the contentions of the petitioners are (1) that the interests received under the three trusts are not of a nature taxable under G. L. (Ter. Ed.) c. 65, and (2) that the interests under the 1862 trust and the interests under the will of Sarah E. Lawrence cannot be united with each other or with other interests to determine the rate of the tax.

The governing statutory provisions are these: By G. L. (Ter. Ed.) c. 65, § 1, property as therein described "which shall pass by will, or by laws regulating intestate succession, or by deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made in contemplation of the death of the grantor or donor or made or intended to take effect in possession or enjoyment after his death * * * shall be subject to a tax at the percentage rates fixed by the following table. * * *" In this table progressive percentages are fixed increasing with the value of the property or interest passing. The last paragraph of said § 1 is in these words: "All prop- [fol. 42d] erty and interests therein which shall pass from a decedent to the same beneficiary by any one or more of the methods hereinbefore specified and all beneficial interests which shall accrue in the manner hereinbefore provided to such beneficiary on account of the death of such decedent shall be united and treated as a single interest for the purpose of determining the tax hereunder." G. L. (Ter. Ed.) c. 65, § 2, reads as follows: "Whenever any person shall exercise a power of appointment, derived from any disposi-

tion of property made prior to September first, nineteen hundred and seven, such appointment when made shall be deemed a disposition of property by the person exercising such power, taxable under section one, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by the donee by will; and whenever any person possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a disposition of property taxable under section one shall be deemed to take place to the extent of such omission or failure in the same manner as though the persons thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

The petitioners contend that their interests arising under the trust established by the intestate in 1877 are not taxable. That contention is based on the facts that the trust was created in 1877 without power to alter or revoke, with life interest in the intestate, and that the youngest of her children was born in 1890, before the passage of any statute imposing an inheritance tax. It is urged that the gift was completed before any tax was permissible. The petitioners invoke Coolidge v. Long, 282 U. S. 582, as decisive in their favor. In that case, by the terms of the deed and declaration of trust the income was to be paid to the settlors during their joint lives and then the entire income to [fol. 42e] the survivor, and upon the death of the survivor the principal was to be divided equally among their five named sons; provided that, if any of the sons should predecease the survivor of the settlors, his share should go to those entitled to take his intestate estate under the statute of distributions in force at the date of the death of such survivor. All the sons were living when the trust was established and were named in the trust instrument. That decision rests upon the ground that the remainder vested in the sons of the settlors at the time when the trust instrument was executed and delivered, which was prior to the enactment of the statute imposing the tax. The circumstance that each son was liable to be divested of his interest in the remainder by his own death before that of the sur-

vivor of the settlors was said not to "render the succession incomplete. The vesting of actual possession and enjoyment depended upon an event which must inevitably happen by the efflux of time, and nothing but his failure to survive the settlors could prevent it." Coolidge v. Long, 282 U. S. 582, at page 598. It was held that to impose a tax in these conditions was an impairment of the obligation of the contract of the trust instrument contrary to art. 1, § 10, of the Constitution of the United States, and also a violation of the due process clause of the Fourteenth Amendment.

The case at bar seems to us distinguishable from Coolidge v. Long. By the instant trust instrument the income was to be paid to the intestate during her life, and after her death the net income was to be paid by quarter-yearly payments to such of her children "as may be living at the time of payment, in equal shares," with provision for payment to issue of any deceased child, "until the expiration of twenty years next succeeding the death of" the intestate; "and upon the expiration of the said twenty years" to transfer in absolute ownership the corpus of the trust "in equal shares to and among the children, then living" of the intestate. It is open to doubt whether this gift over could take effect as a remainder and whether its true nature is not an executory limitation. 1 Fearne on Contingent Remainders (10th ed.) 397, 398. Simonds v. Simonds, 199 [fol. 42f] Mass. 552. It is not necessary to discuss this point. It appears clear that at most the remainder was contingent and not vested until the death of the intestate. None of her children was born at the time the trust was established. Nothing then vested in them. The children of the intestate up to the moment of her death had no interest in the trust except, at best, "a bare contingent remainder expectant upon her death and their surviving her." Wright v. Blakeslee, 101 U. S. 174, 177. There are many decisions to the effect that trust instruments of a tenor similar to the one here in issue constitute contingent remainders, and until the event or date designated for the vesting arrives the persons to take cannot be ascertained and no estate vests in any one before the happening of that event. Olney v. Hull, 21 Pick. 311, 315. Nash v. Nash, 12 Allen, 345, 347. Thomson v. Ludington, 104 Mass. 193. Springfield Safe Deposit & Trust Co. v. Ireland, 268 Mass.

62, 66. Gray on Perpetuities (3d ed.) 86, and cases cited. The case at bar is governed by these decisions. The interest in this trust did not vest in the petitioners until the death of their mother in 1931. That was subsequent to the enactment of the tax law. Whatever interest then vested in them was subject to the tax.

The trust created by Amos A. Lawrence in 1862 gave the intestate a life estate with full power of testamentary appointment and, in failure of such appointment, directed distribution of the corpus of the fund among her children. The succession of the interest of the petitioners in this trust was dependent entirely upon the failure of the intestate to exercise the power of appointment. The intestate was in control of the succession to the interest in this trust so long as she lived, notwithstanding the fact that if no appointment should be made her children would take. The right to enter into enjoyment and possession of this particular trust interest was vested in no one until her death in 1931. It awaited her death and her exercise of, or failure to exercise, the power of appointment before it could descend and vest. Minot v. Treasurer & Receiver General, 207 Mass. 588, 592-593. Saltonstall v. Treasurer & Receiver [fol. 42g] General, 256 Mass. 519, 523-524. Manning v. Board of Tax Commissioners, 46 R. I. 400, 411. The succession, therefore, took effect upon the death of the intestate in 1931. The tax law had been enacted long before that date. The succession was subject to the tax. This point is covered by the decision in Saltonstall v. Saltonstall, 276 U. S. 260, 270, 271, 272. We are unable to perceive anything inconsistent with this conclusion in Coolidge v. Long, 282 U. S. 582, or in Helvering v. Grinnell, 294 U. S. 153.

The interests accruing to the petitioners as children of the intestate under the will of Sarah E. Lawrence did not vest upon the death of the latter in 1891. Under the terms of that will already stated, the net income of that trust was to be paid in equal shares to her six children during their lives and to the issue of any deceased child. After the death of the last survivor of her children and for twenty years thereafter, shares in the net income were to be paid quarter-yearly to her grandchildren living at the time of payment. This gift of income to the children of the intestate was contingent in a double aspect. In order to take,

such child must survive the intestate and also be living at the time of payment. So, also, as to sharing in the principal; grandchildren who decease before the time set for the termination of the trust are excluded and, until that time arrives, the persons to be benefited cannot be ascertained. Apart from these contingencies, the interests of the children of the intestate did not vest upon the death of Sarah E. Lawrence in 1891, because the intestate was given power of appointment of the shares of income among her children. Until her death, the right to this interest vested in no one. Minot v. Treasurer & Receiver General, 207 Mass. 588, 592-593. Saltonstall v. Saltonstall, 276 U. S. 260, 269-270. The same principal applies as has been stated with respect to the Amos A. Lawrence trust.

The contention that the failure of the intestate to exercise the special testamentary power of appointment given to her by the will of Sarah E. Lawrence does not afford basis for a tax cannot be supported. The argument is that the intestate was given a special non-exclusive power of [fol. 42h] appointment which must be exercised, if at all, in favor of her children or issue of a deceased child, that she was not at liberty to exclude any of her children or issue of a deceased child from a share, and that she must give to each a substantial share and could not give a merely nominal or illusory amount. That argument cannot prevail in this Commonwealth. The case at bar on this point is governed by Burnham v. Treasurer & Receiver General, 212 Mass. 165. The failure of the intestate to exercise the power of appointment is indicative of approval of equal division. There appears to be no reason to overrule this controlling authority. It has not been shaken or weakened by any subsequent decisions. We are unable to perceive that it is incompatible with any provision of the Constitution of the United States.

There was no error in uniting the several interests passing to the petitioners on the death of the intestate for the purpose of determining the tax under the last paragraph of G. L. (Ter. Ed.) c. 65, § 1, already quoted. Manifestly the interests passing under the 1877 trust established by the intestate were properly united with those passing from her by intestate succession. Marble v. Treasurer & Receiver General, 245 Mass. 504. Pratt v. Dean, 246 Mass. 300.

The interests established by the Amos A. Lawrence trust of 1862 and those created by the will of Sarah E. Lawrence may likewise be so united. It is expressly provided by G. L. (Ter. Ed.) c. 65, § 2, that, whenever property passes by omission or failure of the donee of a power to exercise a power of appointment, "a disposition of property taxable under section one shall be deemed to take place * * * as though the persons thereby becoming entitled * * * had succeeded thereto by a will of the donee of the power * * *" Those words are thus imported into § 1 of said c. 65 and the property is taxable according to its terms. It follows that these interests by virtue of these sections are taxable as property of the intestate passing upon her death. See Ames v. Commissioner of Corporations & Taxation, 269 Mass. 352.

The provisions of G. L. (Ter. Ed.) c. 65, § 2, are not violative of the constitutional guaranty of equal protection of [fol. 42i] the laws. They apply only to the exercise of powers of appointment derived from any disposition of property made prior to September 1, 1907. This constitutional guaranty does not prevent reasonable classification nor condemn differences resulting from such classification. Tax laws must become operative on some date. The date named was when St. 1907, c. 563, became effective by which the tax was made applicable to direct as well as to collateral inheritances. The legislative intent possibly was to tax succession under St. 1907, c. 563, not as from the donee but from the donor of the power. Whatever the reason, the classification cannot be pronounced arbitrary or unreasonable. The tax operates equally and uniformly as to all within this class. It may fairly have been deemed by the General Court to be founded in the "purposes and policy of taxation." Watson v. State Comptroller, 254 U. S. 122, 125. Maxwell v. Bugbee, 250 U. S. 525, 543. Stebbins v. Riley, 268 U. S. 137, 142. Louisville Gas & Electric Co. v. Coleman, 277 U. S. 32, 37. Hayes v. Missouri, 120 U. S. 68, 71, 72. Colgate v. Harvey, — U. S. — (decided December 16, 1935). The decision in In re Estate of Pedersen, 198 Iowa, 166, 172, 173, precisely supports the conclusion here reached.

No argument has been made as to the calculation of the tax. What has been said disposes of the controversies as

presented. It follows that the petition for abatement must be denied.

Ordered accordingly.

C. M. Rogerson, for the petitioner .
C. F. Lovejoy, Assistant Attorney General, for the respondent.

Reporter's certificate to foregoing paper omitted in printing.

[fol. 42j] [File endorsement omitted.]

[fol. 43] In Probate Court of Norfolk County

No. 28100

Estate of Sarah E. Lawrence

Petition for Abatement of Massachusetts Succession Tax

Final Decree After Rescript—Filed January 20, 1936

At a Probate Court holden at Dedham in and for said County of Norfolk on the twentieth day of January in the year of our Lord, One Thousand Nine Hundred and Thirty-six.

Upon a reservation and report of said Court dated February 20, 1935, on petition for abatement of Massachusetts succession tax, and rescript thereon returned from the Supreme Judicial Court and being dated January 2, 1936,

It Is Decreed that said petition for abatement of Massachusetts Succession Tax, filed by Harriet C. Binney, et als., trustees under the Will of Sarah E. Lawrence, be and the same hereby is denied.

Joseph R. McCoole, Judge of Probate Court.

January 20, 1936.

[File endorsement omitted.]

[fol. 44] Withdrawal of appearance for petitioners, filed April 17, 1936, omitted in printing.

Appearance of counsel for petitioners, filed April 17, 1936, omitted in printing.

[fol. 45] IN PROBATE COURT OF NORFOLK COUNTY

[Title omitted]

Petition for Appeal, Assignment of Errors, and Prayer for Reversal—Filed April 17, 1936

Considering themselves aggrieved by the final decree entered in the above entitled cause (pursuant to the decision and rescript of the Supreme Judicial Court of the Commonwealth of Massachusetts) by the Probate Court for the County of Norfolk in said Commonwealth under the docket number 28100, the petitioners therein, Harriet C. Binney, Frederic Cunningham, Constance C. Pertzoff, Susannah C. Coolidge, Frederic Cunningham and George S. Parker as trustees under indenture of trust dated January 26, 1877, Frederic Cunningham as administrator of the estate of Hetty Sullivan, Lawrence Cunningham, and William Lawrence, John S. Lawrence, Leverett Saltonstall and Augustus Hemenway as they are trustees under the will of Sarah E. Lawrence, hereby pray that an appeal be allowed to the Supreme Court of the United States herein and that there be entered an order fixing the amount of the bond on such appeal.

Said petitioners assign the following errors in the record and proceedings herein:

1. Said Supreme Judicial Court erred in refusing to hold that section 1 of chapter 65 of the General Laws of Massa-
[fol. 46] chusetts (Ter. Ed.) (as constructed by said court) denies to the petitioners and to those claiming under them the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

2. Said Supreme Judicial Court erred in refusing to hold that section 2 of chapter 65 of the General Laws of Massachusetts (Ter. Ed.) (as construed by said court) denies to the petitioners and to those claiming under them the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

3. Said Supreme Judicial Court erred in refusing to hold that section 1 of chapter 65 of the General Laws of Massachusetts (Ter. Ed.) (as construed by said court) deprives the petitioners and those claiming under them of their property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

4. Said Supreme Judicial Court erred in refusing to hold that section 2 of chapter 65 of the General Laws of Massachusetts (Ter. Ed.) (as construed by said court) deprives the petitioners and those claiming under them of their property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

5. Said Supreme Judicial Court erred in holding that each of the taxes now in question, and the total of said taxes, were lawfully assessed and that the petitioners are not entitled to the abatement thereof.

6. Said Probate Court erred in denying the petitioners' prayer for abatement and in dismissing their petition.

7. Said Supreme Judicial Court erred in refusing to hold that sections 1 and 2 of chapter 65 of the General Laws of Massachusetts (Ter. Ed.) (as construed by said court and as applied to the facts revealed on the record in this cause) [fol. 47] deny to the petitioners and to those claiming under them the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States because

(a) Said sections as construed purport, by virtue of provisions originally enacted in the year 1909, to impose an inheritance or succession tax upon the succession to property by the petitioners under the provisions of an inter vivos trust established in 1862 and the provisions of a testamentary trust established in 1891, solely because said property was subject to unexercised powers of appointment created prior to September 1, 1907, whereas if these powers had been created by exactly similar instruments effective subsequent to September 1, 1907, no succession tax would be imposed under said sections or otherwise on the succession to property under the inter vivos trust and the passing of property under the testamentary trust, if taxable at all, would be taxable at a different and lower rate than that of the assessment in fact made upon it.

(b) Said sections as construed purport, by virtue of provisions originally enacted in 1909, to authorize the adding together, for the purposes of levying a higher rate of tax under a schedule of graduated tax rates which increase as the sum taxed increases, of (i) property inherited by various of the petitioners under the terms of trusts established by two settlors, now deceased, in 1862 and in 1891, and (ii) property passing by intestacy and inherited by the petitioners from a third decedent who died in 1931, solely because this decedent was the donee of a general testamentary power of appointment under the 1862 trust and a special testamentary power of appointment under the 1891 trust, neither of which powers said decedent did in fact exercise; whereas if these powers of appointment had been created by instruments which had taken effect after September 1, 1907, the property to which the petitioners succeeded by the terms of one of these trusts would not be [fol. 48] taxed, and that property to which the petitioners succeeded by the terms of the other trust, if taxable at all, could only be taxed at one-quarter the rate which was in fact assessed upon it.

8. Said Supreme Judicial Court erred in refusing to hold that sections 1 and 2 of chapter 65 of the General Laws of Massachusetts (Ter. Ed.) (as construed by said court and as applied to the facts revealed on the record in this cause) deprive the petitioners and those claiming under them of their property without due process of law contrary to the Fourteenth Amendment to the Constitution because

(a) Said sections (as so construed and applied) purport to treat property passing to various of the petitioners in default of the exercise of the powers of appointment here involved as property of the donee of such powers, when in fact it was in no sense the property of the donee, in order to unite such property with the interests of the said petitioners (arising by intestacy) in the estate of the said donee and by so uniting it (i) to tax the property so passing in default of the exercise of one of such powers which would not be subject to tax if treated as the property of the donor of that power, and (ii) to tax the property passing in default of the exercise of the other power at a higher rate than would be permitted by said sections, if the said property had been taxed as passing to such petitioners from the donor of the power;

(b) Said sections (as construed and applied by said court) purport to tax, as property passing from the donee of the powers hereinafter mentioned, property to which various of the petitioners succeeded in default of the exercise of powers of appointment, created by persons other than the donee of such powers under an instrument of trust [fol. 49] executed and effective, and under the will of a person dying, prior to the enactment and the effective date of said sections;

(c) Said sections (as construed and applied by said court) purport to tax property passing to the petitioners in default of the exercise of powers of appointment, created under wills or instruments of trust effective prior to the enactment and the effective date of said sections, despite the fact that the interests taken by the petitioners were in no manner affected, and, in some instances could in no manner be substantially affected, by any act of the donee of the powers.

(d) Said sections (as construed and applied by said court) purport to tax the succession of various of the petitioners to property passing under the terms of an indenture of trust which neither contained nor reserved any power to revoke, alter or amend or any power of appointment and which was executed and effective prior to the enactment of the said sections, when the interests of the said petitioners in this property were before the said enactment fixed and determined beyond any possibility of change except by the birth of an additional member of a class of beneficiaries of which the said petitioners are members or by the death of a member or members of that class.

9. Said Supreme Judicial Court erred in failing to hold that section 1 and section 2 of chapter 65 of the General Laws of Massachusetts (Ter. Ed.) (as construed and applied by said court) are each repugnant to section 10 of Article I of the Constitution of the United States in that they severally impair the obligation of the contract embodied in each of the following documents:

(a) said trust indenture dated January 26, 1877,

[fol. 50] (b) an agreement dated July 24, 1862, whereby the Massachusetts Hospital Life Insurance Company

agreed in consideration of the receipt of a certain sum from Amos A. Lawrence to hold said sum upon certain trusts,

(c) the will of Sarah E. Lawrence who died in 1891.

For which errors said petitioners pray that the final decree of the Probate Court for the County of Norfolk in the Commonwealth of Massachusetts entered in the above entitled cause on January 20, 1936, (pursuant to the decision and rescript of the Supreme Judicial Court of said Commonwealth) be reversed and a decree entered in favor of said petitioners and for their costs.

Palmer, Dodge, Barstow, Wilkins & Davis, R. Ammi Cutter, Talcott M. Banks, Jr., Solicitors for Petitioners.

[fol. 50½] [File endorsement omitted.]

[flo. 51] In Probate Court of Norfolk County

[Title omitted]

Order Allowing Appeal—Filed April 17, 1936

The appellants in the above entitled cause, and each of them, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the decree made and entered in the above entitled cause by the Probate Court for the County of Norfolk in the Commonwealth of Massachusetts under docket No. 28,100 on the 20th day of January, 1936, and from each and every part thereof, and having presented and filed their petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction on appeal, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided;

It is now here ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Probate Court for the County of Norfolk and Commonwealth of Massachusetts in the above entitled cause, as provided by law, and it is further ordered that the register of probate for said County of Norfolk shall pre-
[fol. 52] pare and certify a transcript of the record, pro-

ceedings and decree in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said court within forty days of this date.

And it is further ordered that security for costs on appeal be fixed in the sum of two hundred dollars ($200).

Joseph R. McCoole, Judge of the Probate Court for the County of Norfolk in the Commonwealth of Massachusetts.

April 17, 1936.

[File endorsement omitted.]

[fols. 53 & 54] Bond on appeal for $200.00, approved and filed April 17, 1936, omitted in printing.

[fol. 55] Citation, in usual form, showing service on Henry F. Long, filed April 21, 1936, omitted in printing.

[fol. 56] In Supreme Court of the United States

[Title omitted]

Stipulation re Transcript of Record—Filed May 14, 1936

It is hereby agreed that the portions of the record hereinafter specified and no others be included in the transcript to be transmitted to the Supreme court of the United States in connection with the appeal of Harriet C. Binney and others from the decree entered by the Probate Court for the County of Norfolk in the Commonwealth of Massachusetts on January 20, 1936, denying the petition brought by them against Henry F. Long, Commissioner of Corporations and Taxation of said Commonwealth, for the abatement of certain taxes:

1. Petition in equity for abatement of succession tax (including copy of Trust Indenture of January 26, 1877, copy of will of Sarah E. Lawrence, and copy of codicil to will of Sarah E. Lawrence) filed September 20, 1933.

2. Appearance of Charles M. Rogerson, Esq., for petitioners.

3. Citation and return of service.

4. Appearance of Joseph E. Warner, Attorney General, for the Commissioner of Corporations and Taxation.

5. Agreed statement of facts (including Exhibit "A", Copy of Trust Indenture of January 26, 1877, and Exhibit "C", Copy of Agreement for Annuity in Trust dated July 24, 1862).

[fol. 57] 6. Amendment to Agreed Statement of Facts (allowed February 20, 1935).

7. Reservation and Report.

8. Rescript.

9. Opinion of Supreme Judicial Court.

10. Final decree after rescript (entered January 20, 1936).

11. Withdrawal of the appearance of Charles M. Rogerson, Esq., for petitioners.

12. Appearance of R. Ammi Cutter and Talcott M. Banks, Jr., for petitioners.

13. Petition for appeal, assignment of errors and prayer for reversal.

14. Statement as to jurisdiction upon appeal.

15. Order allowing appeal (entered April 17, 1936).

16. Bond on appeal.

17. Citation (with return of service).

18. Statement of service upon the Commissioner of Corporations and Taxation of a copy of the petition for and order allowing the appeal, a copy of the assignment of errors and of the statement as to jurisdiction upon appeal, and a statement directing attention to the provisions of Paragraph 3 of Rule 12 of the Supreme Court of the United States (with acceptance of service).

It is further agreed

1. That Items 2, 3, 4, 11, 12, 16, 17 and 18 need not be printed, and

2. That Exhibit "A" (copy of Trust Indenture dated January 26, 1877) annexed to the Agreed Statement of Facts, Item 5, supra, need not be printed inasmuch as this exhibit is annexed also to the Petition in Equity for Abatement of Succession Tax (Item 1, supra), and will be printed as so annexed and as so printed may be referred to at the

end of the Agreed Statement of Facts (Item 5, supra) as printed.

R. Ammi Cutter, Talcott M. Banks, Jr., Solicitors for Appellants. Paul A. Dever, Attorney General, by James J. Ronan, Assistant Attorney General.

[File endorsement omitted.]

[fol. 58] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION TO PRINT ENTIRE RECORD—Filed May 23, 1936

The appellants adopt their assignment of errors as their statement of the points to be relied upon and represent that the whole of the record as filed, other than the bond on appeal and the appearances of counsel, is necessary for the consideration of the case.

R. Ammi Cutter, Talcott M. Banks, Jr., Solicitors for Appellants.

Boston, Massachusetts, May 12, 1936.

Due and sufficient service of the foregoing statement and designation is hereby acknowledged.

Paul A. Dever, Attorney General of Massachusetts, by James J. Ronan, Assistant Attorney General.

[fol. 59] [File endorsement omitted.]

Endorsed on cover: File No. 40,613. Massachusetts Probate Court, County of Norfolk. Term No. 77. Harriet C. Binney, Frederic Cunningham, and Constance C. Pertzoff, et al., appellants, vs. Henry F. Long, Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts. Filed May 23, 1936. Term No. 77, O. T., 1936.

FILE COPY

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JUL 23 1936

CHARLES ELMORE CROPLEY

CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. [redacted] 77

HARRIET C. BINNEY, FREDERIC CUNNINGHAM, AND CONSTANCE C. PERTZOFF ET AL.,

Appellants,

vs.

HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS.

APPEAL FROM THE PROBATE COURT, COUNTY OF NORFOLK, COMMONWEALTH OF MASSACHUSETTS.

STATEMENT AS TO JURISDICTION.

R. AMMI CUTTER,
TALCOTT M. BAKER, JR.,
Counsel for Appellants.

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IN THE

PROBATE COURT FOR THE COUNTY OF NORFOLK

No. 28100

HARRIET C. BINNEY ET ALS.

vs.

HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION.

STATEMENT AS TO JURISDICTION UPON APPEAL.

To the Honorable the Judge of the Probate Court in and for the County of Norfolk:

The appellants in support of the jurisdiction of the Supreme Court of the United States to review the above-entitled cause on appeal submit the annexed statement as to jurisdiction upon appeal.

PALMER, DODGE, BARSTOW,
WILKINS & DAVIS,
R. AMMI CUTTER,
TALCOTT M. BANKS, JR.,
Solicitors for the Appellants.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 1059

HARRIET C. BINNEY ET ALS.

vs.

HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION.

STATEMENT AS TO JURISDICTION ON APPEAL.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The appellants in support of the jurisdiction of this Court to review the above-entitled cause on appeal respectfully represent as follows:

I.

Statutory Provision Sustaining Jurisdiction.

Section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 937 (U. S. C., Title 28, § 344), is as follows:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the

Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

* * * * * * *

Pursuant to the Act of January 31, 1928 (45 Stat. 54; U. S. C., Title 28, § 861a), as amended by the Act of April 26, 1928 (45 Stat. 466; U. S. C., Title 28, § 861b), the present appeal is brought in lieu of a writ of error.

II.

Massachusetts Statute of Which the Validity is Involved.

The appellee assessed succession taxes, as set forth more fully below, upon property interests of the petitioners under color of Sections 1 and 2 of Chapter 65 of the General Laws of Massachusetts (Tercentenary Edition), found on pages 813-815 of that Edition, the material provisions of which are as follows:

"SECTION 1. All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, belonging to inhabitants of the commonwealth, and all real estate or any interest therein and all tangible personal property within the commonwealth belonging to persons who are not inhabitants of the commonwealth except such an interest in such real estate as is represented by a mortgage or by a transferable certificate of participation or share of an association, partnership or trust, which shall pass by will, or by laws regulating intestate succession, or by deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made in contemplation of the death of the grantor or donor or made or intended to take effect in possession

or enjoyment after his death, and any beneficial interest therein which shall arise or accrue by survivorship in any form of joint ownership in which the decedent joint owner contributed during his life any part of the property held in such joint ownership or of the purchase price thereof, to any person, absolutely or in trust, except to or for the use of charitable, educational or religious societies or institutions, the property of which is by the laws of the commonwealth exempt from taxation, or for or upon trust for any charitable purposes to be carried out within the commonwealth, or to or for the use of the commonwealth or any town therein for public purposes, shall be subject to a tax at the percentage rates fixed by the following table:

(Table of rates quoted only to extent here pertinent.)

Relationship of Beneficiary to Deceased.	Rate Per Centum of Tax on Value of Property or Interest.			
	On Value not over $10,000.	On Excess above $10,000, not over $25,000.	On Excess above $25,000, not over $50,000.	On Excess above $50,000, not over $250,000.
Class A.				
Husband, wife, father, mother; child, adopted child, adoptive parent, grandchild.....	1%	1%	2%	4%
Class B.				
Lineal ancestor, except father or mother; lineal descendant, except child or grandchild; lineal descendant of adopted child; lineal ancestor of adoptive parent; wife of widow of a son; husband of a daughter.....	1%	2%	4%	5%

Provided, however, that no property or interest therein, which shall pass or accrue to or for the use of a person in Class A, except a grandchild of the deceased, unless the value exceeds ten thousand dollars, and no other property or interest therein, unless its value exceeds one thousand dollars, shall be subject to the tax imposed by this chapter, and no tax shall be exacted upon any property or interest so passing or accruing which shall reduce the value of such property or interest below said amounts.

"All property and interests therein which shall pass from a decedent to the same beneficiary by any one or more of the methods hereinbefore specified and all beneficial interests which shall accrue in the manner hereinbefore provided to such beneficiary on account of the death of such decedent shall be united and treated as a single interest for the purpose of determining the tax hereunder.

"SECTION 2. Whenever any person shall exercise a power of appointment, derived from any disposition of property made prior to September first, nineteen hundred and seven, such appointment when made shall be deemed a disposition of property by the person exercising such power, taxable under section one, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by the donee by will; and whenever any person possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a disposition of property taxable under section one shall be deemed to take place to the extent of such omission or failure in the same manner as though the persons thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

III.

Dates of Decree and of Presentation of Application for Appeal.

The decree sought to be reviewed was entered on January 20, 1936, in the Probate Court for the County of Norfolk, pursuant to a rescript from the Supreme Judicial Court of Massachusetts. The opinion of the Supreme Judicial Court, in accordance with which the rescript was issued, is not yet officially reported but has been printed in Mass. Adv. Sh. (1936) 153 and in 199 N. E. 528. The application for appeal is to be presented this 17th April, 1936.

IV.

Nature of the Case and Jurisdiction Upon Appeal.

The appellants are the trustees and certain beneficiaries of three trusts and the heirs-at-law and next of kin of Hetty Sullivan Lawrence Cunningham (frequently hereinafter referred to as "the intestate") who died intestate on August 20, 1931. All three trusts involved in this appeal were created before the enactment of any Massachusetts statutes by which the interests of these appellants as beneficiaries of these trusts, or as heirs-at-law of the decedent, could have been subjected to a succession or inheritance tax.

The terms of the first trust, which was established by agreement *inter vivos*, are summarized as follows in the opinion of the Supreme Judicial Court (199 N. E. at 529) referred to above:

> "In 1862, Amos A. Lawrence, the father of the intestate, created a trust for her benefit, which was accumulated until 1877, and thereafter the income was paid to her during her life. At her death, the principal

and unpaid income were to be distributed to such persons as she might by will appoint and, in default of appointment, to her surviving children."

Upon the death of the intestate the trust fund was distributed in accordance with these terms to her four surviving children, petitioners herein. The share of each child was within the amount exempted from tax by the second paragraph of Section 1 of Chapter 65 of the General Laws (Ter. Ed.), so that no succession tax could be levied by the Commonwealth of Massachusetts upon any of the shares unless they were united with other interests for the purpose of taxation.

The terms of the second trust are summarized as follows in the opinion of the Supreme Judicial Court (199 N. E. at 529):

> "In 1877 the intestate created a trust. Its pertinent terms were these: she reserved to herself only a life estate of the net income but no power to revoke, alter or amend. From and after her death, for twenty years, the net income was payable by quarter-yearly payments in equal shares 'to and among such of' her children as 'may be living at the time of payment,' living issue of a deceased child to take by right of representation. At the expiration of the twenty years after the death of the intestate, the trustees were to make division of the principal of the trust equally among her children then living, the issue of any deceased to take by right of representation with the provision that, if at her death or at any time during the twenty years next thereafter no child or issue of the intestate should be living, the trustees should transfer the principal of the trust to the heirs at law of her father if he then were deceased; otherwise to her own heirs at law."

At the intestate's death the appellee valued the interests under this trust of her four children, appellants herein, for the purposes of assessing succession taxes. Each interest

as so valued was within the amount established as exempted from tax by Section 1 of Chapter 65 of the General Laws (Ter. Ed.) and consequently by the terms of the statute no succession tax could have been levied by Massachusetts upon any of these interests unless other interests were united with them for the purpose.

The terms of the third trust are thus described in the opinion of the Supreme Judicial Court (199 N. E. at 529):

> "Each of the four children of the intestate succeeded on her death to an interest in a trust established under the will of her mother, Sarah E. Lawrence, who died in 1891. Property was thereby left to pay the income to each of her six children, two of whom are now living, and to the issue *per stirpes* of any such child deceased, so long as any of the six children should live; and for twenty years after the death of the last survivor, the income was to be paid to the grandchildren and to their issue *per stirpes*. The will then provided that each child by will might 'appoint the shares in which' the income given to his or her children and issue 'shall be apportioned among such children and issue,' and might also appoint the proportions in which the principal given to such children and issue 'shall be divided among such children and issue'."

The intestate, Mrs. Cunningham, did not exercise the special testamentary power of appointment given her by the will of her mother, Mrs. Lawrence. At Mrs. Cunningham's death the appellee determined the value of the interests under this trust passing to each of Mrs. Cunningham's four children. By the graduated rates of taxation incorporated in Section 1 of Chapter 65 of the General Laws (Ter. Ed.), each of these four interests as valued by the appellee, if taxable at all, would not be taxed by the Commonwealth at a rate in excess of one per cent. By uniting each such interest with other interests received in possession and enjoyment by these four children at Mrs.

Cunningham's death, the rate of tax levied by the appellee was increased to four per cent.

When the intestate, Mrs. Cunningham, died her own property, amounting to $299,241.58, was divided among her four children as her sole heirs-at-law. This property was also taxed by the respondent, but the appellants do not contest this tax either as to validity or as to rate.

After the death of the intestate, Mrs. Cunningham, in 1931, the appellee, purporting to act under authority of Sections 1 and 2 of the General Laws (Ter. Ed.), assessed certain succession taxes upon the interests of Mrs. Cunningham's four children under each of the three trusts and also upon the shares of the four children in Mrs. Cunningham's net estate. For the purpose of determining the rate and amount of this tax with respect to each child, the appellee united the interest of such child under each of the three trusts with his interest in the estate of the intestate, Mrs. Cunningham, and taxed the aggregate amount received by each child from all these sources at the rate established by Section 1 of Chapter 65 of the General Laws (Ter. Ed.) as applicable to such amount if taxable as an aggregate under Sections 1 and 2. By this method of computation the appellee assessed a tax on the total value of all the interests of each child at the rate of four per cent.

Each of the appellants paid his proportionate share of all these taxes assessed by the appellee and they subsequently filed a petition for an abatement of such taxes in the Probate Court for the County of Norfolk, pursuant to the second paragraph of Section 27 of Chapter 65 of the General Laws (Ter. Ed.) which reads as follows:

> "An executor, administrator, trustee, grantee, donee, survivor or beneficiary aggrieved by any determination of the commissioner may, within one year after the payment of any such tax, apply by a petition

in equity to the probate court having jurisdiction of the estate of the decedent for the abatement of the tax or any part thereof, and if the court adjudges that the tax or any part thereof was wrongly exacted it shall order an abatement of such part thereof as was assessed without authority of law. Upon a final decision ordering an abatement of any part of such a tax, the treasurer shall pay the amount adjudged to have been illegally exacted, with interest, without any further appropriation therefor by the general court."

In their petition the appellants claimed each and all of these taxes excepting those assessed upon the net estate of the intestate, to be illegal and excessive, and the imposition of them to be in violation of the Constitution of the United States of America, in that they deprived the appellants of their property without due process of law and denied them the equal protection of the laws.

The Probate Court, without making any decision, reserved all questions of law presented by the pleadings and an agreed statement of facts for the determination of the Supreme Judicial Court, which is the highest court of the Commonwealth of Massachusetts. This procedure was in accordance with Sections 9 and 13 of Chapter 215 of the General Laws of Massachusetts (Ter. Ed.) the material parts of these sections being as follows:

"SECTION 9. A person aggrieved by an order, decree or denial of a probate court made after this chapter takes effect, may, within twenty days after the entry thereof, appeal from the same to the supreme judicial court, and the appeal shall be heard and determined by the full court, which shall have like powers and authority in respect thereto as upon an appeal in a suit in equity under the general equity jurisdiction."

* * * * * * *

"SECTION 13. A judge of the probate court by whom a case or matter is heard for final determination may reserve and report the evidence and all question of law therein for consideration of the full court, and thereupon like proceedings shall be had as upon appeal."

The case was fully argued before the Supreme Judicial Court in behalf of both the appellants and the appellee.

In particular the appellants asserted that uniting property received by each child of the intestate from three different sources, viz: from Amos A. Lawrence, under the trust established by him in 1862; from Sarah E. Lawrence, by the terms of her testamentary trust; and by intestacy from Hetty Sullivan Lawrence Cunningham, for the dual purpose of levying a succession tax upon property which would otherwise be exempt and of increasing the rate of succession tax upon other property, is a denial to these children of due process of law and is as to these children a deprivation of property without due process and a denial of the equal protection of the laws in violation of the Fourteenth Amendment.

(Cf. *Hoeper* v. *Tax Commission of Wisconsin*, 284 U. S. 206).

The appellants further asserted that it was a denial of the equal protection of the laws, and an arbitrary and unresonable discrimination, to subject them to succession taxes in respect to property to which they were entitled by the terms of instruments which became effective many years before the enactment of any direct succession tax in Massachusetts, and to so subject them to tax for the sole reason that the trusts, under which the taxed property was held, contained powers of appointment, never exercised, created before September 1, 1907. It is the contention of the appellants that in Massachusetts property passing in

default of the exercise of a power of appointment created subsequent to September 1, 1907, given to a person other than the settlor (in circumstances exactly similar to those of the creation of the trust by Amos A. Lawrence in 1862) would not be subject to succession tax.

The appellants also asserted that they were denied the equal protection of the laws in that the existence, in two of the trusts here involved, of powers of appointment created before September 1, 1907, was taken by the appellee as sufficient justification for uniting interests received from these trusts by the four beneficiaries with their interests in the estate of the donee of the power, to the end that a succession tax should be levied upon certain property which otherwise would have been specifically exempt and that the tax levied upon other property passing in default of the exercise of the powers of appointment should be increased; whereas, if the powers of appointment had been created after September 1, 1907, such uniting of the various interests for succession tax purposes would not have been permitted or required by the statute. The appellants contended that the date of creating the power bore no reasonable or necessary relation to the subject of the tax and made a distinction that was wholly arbitrary and without basis.

It was also urged by the appellants that to assume to tax the appellants' interests under the trust established by the intestate in 1877, by virtue of a statute enacted more than thirty years later, was a violation of the due process clause of the Fourteenth Amendment. The appellants contended that the settlor had parted finally with all her interest in the property, beyond her own life interest, many years before the enactment of the taxing statute; that she had no power to revoke, alter or amend the trust and so could do no act which would affect the disposition of the remainder interest; and that the remainder interest in fact passed to bene-

ficiaries, born before the enactment of the taxing statute, who could only be prevented from taking the interest by the happening of events entirely outside their own and the settlor's control. In view of the general language of the opinion (199 N. E. at 530) and the citation of *Coolidge* v. *Long*, 282 U. S. 582, 598, the Supreme Judicial Court also clearly included in its decision in the case at bar a decision that there was no impairment of the obligation of contract in violation of Article I, Section 10 of the Constitution of the United States. The appellants also contend that this conclusion was erroneous.

Finally it was contended by the appellants that it was a violation of the Fourteenth Amendment to the Constitution to tax the vesting in possession and enjoyment of remainder interests received under trusts established long prior to the enactment of the taxing statute merely because powers of appointment were given to the life beneficiary of the trusts when these powers were never exercised, in no way affected the disposal of the property, were not reserved to the donor and could not in fact be exercised to return to the donor the property originally placed in trust.

The Supreme Judicial Court sent down a rescript directing that the petition be dismissed. The rescript incorporated by reference the opinion of that court. That opinion ruled adversely to all of the appellants' contentions that Sections 1 and 2 of Chapter 65 of the General Laws (Ter. Ed.) were repugnant to the Constitution of the United States and sustained in all particulars the constitutional validity of Sections 1 and 2 as applied to the situation in the case at bar.

The Probate Court entered a final decree pursuant to the rescript dismissing the petition. Under the Massachusetts practice the decree so entered constitutes the final decision of the highest court of the State in which a decision could

be had, so that the appeal is taken directly from that decree. The procedure has been exactly the same as that in *Coolidge* v. *Long,* 282 U. S. 582, in which Section 1 of Chapter 65 of the General Laws was held unconstitutional as applied to a trust similar in essential respects to the trust established by the intestate in 1877 which is involved here.

The constitutionality of another aspect of the statute under consideration was considered in *Saltonstall* v. *Saltonstall,* 276 U. S. 260, and that case is also direct authority for the assumption of appellate jurisdiction. The particular aspects of this statute involved in this petition for abatement have not been ruled upon by the Supreme Court of the United States in any connection.

The appellants, therefore, submit that this Court has jurisdiction of their appeal by virtue of Section 237 (a) of the Judicial Code as amended by the Act of February 13, 1925.

R. AMMI CUTTER,
TALCOTT M. BANKS, JR.,
Counsel for Appellants.

17th April, 1936.

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Supreme Court of the United States.

OCTOBER TERM, 1936.

No. 77.

HARRIET C. BINNEY, FREDERIC CUNNINGHAM, AND CONSTANCE C. PERTZOFF ET AL., *Appellants*,

v.

HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS.

APPELLANTS' BRIEF.

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Supreme Court of the United States.

OCTOBER TERM, 1936.

No. 77.

HARRIET C. BINNEY, FREDERIC CUNNINGHAM, AND CONSTANCE C. PERTZOFF ET AL., APPELLANTS,

v.

HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS.

APPELLANTS' BRIEF.

BRIEF SUMMARY OF CASE.

The appellants are the heirs at law of Hetty Sullivan Lawrence Cunningham, intestate, late of Brookline, Massachusetts, and the trustees and certain beneficiaries of three trusts in which the intestate had a life interest. The trusts were as follows:

a) The 1862 trust—created by the intestate's father *inter vivos*, the intestate being given a general testamentary power of appointment (R. 19-21).

b) The 1877 trust—created by the intestate, reserving a life interest to herself, giving remainders to her children and others, and reserving no power of appointment and no power to revoke, alter or amend (R. 4-6).

c) The 1891 trust—created by the will of the intestate's mother, under which the intestate had a narrowly limited testamentary power of appointment (R. 6-16).

At the effective dates of all these instruments no Massachusetts statute imposed any tax upon the succession of lineal descendants.

This case involves inheritance taxes assessed by the appellee under color of GENERAL LAWS (Ter. Ed.), chapter 65, sections 1 and 2, upon the several shares of the heirs and beneficiaries in the trust premises of those three trusts. The powers of appointment in the 1862 and 1891 trusts were not exercised, since the decedent left no will, and all succession to interests in each of the three trusts occurred as provided by the original instruments. In assessing these taxes the appellee united the interests of the beneficiaries in the trusts with their interests in the intestate's own property received through inheritance. This method of assessment, in so far as it raised the rate of tax and caused the taxation of shares otherwise exempt, and the levy of any taxes upon the successions under the trusts, are contested by the appellants as being repugnant to the Constitution of the United States. The constitutional questions were duly raised in the state courts and there decided adversely to the appellants' contentions.

[See for further statement of the case, *infra*, pp. 3-12.]

THE OPINION OF THE COURT BELOW.

The decree sought to be reviewed was entered on January 20, 1936, in the Probate Court for the County of Norfolk, pursuant to a rescript from the Supreme Judicial Court of Massachusetts. The opinion of the Supreme Judicial Court, in accordance with which the rescript was issued, is not yet officially reported, but has been printed in Mass. Adv. Sh. (1936) 153, and in 199 N.E. 528.

THE JURISDICTION OF THIS COURT.

In a petition for the abatement of the Massachusetts succession taxes assessed upon the appellants' interests in the

three trusts, the appellants asserted that the statutes imposing the taxes, as construed by the state taxing authorities, deprived them of their property without due process of law and denied them the equal protection of the laws in violation of the Constitution of the United States (R. 3). By final decree, filed January 20, 1936, the highest court of the state having jurisdiction dismissed the petition, pursuant to a rescript from the Supreme Judicial Court which incorporated an opinion of that Court expressly sustaining the validity of the statutes as applied.

Under the provisions of the Act of January 31, 1928 (45 Stat. 54; U.S.C. Title 28, §861a), as amended by the Act of April 26, 1928 (45 Stat. 466; U.S.C. Title 28, §861b), the present appeal is brought in lieu of a writ of error. The appeal was allowed by the state court by order entered April 17, 1936.

A full statement as to jurisdiction has been heretofore filed with this Court in compliance with paragraph 1 of Rule 12, and reference to that statement is made for a discussion of the statutory requirements of jurisdiction. On June 1, 1936, this Court entered an order postponing further consideration of the question of jurisdiction to the hearing of the case on the merits. The appellants believe that novel and substantial questions are presented by this appeal. These questions are set out in the statement of the case and are treated at length in the sections of this brief devoted to the argument.

Statement of the Case.

The 1862 Trust.

In 1862 Amos A. Lawrence paid a sum of money to the Massachusetts Hospital Life Insurance Company, a Massachusetts corporation, and the Company agreed, by a written contract dated July 24, 1862 (R. 19-21), to hold the fund

upon terms summarized as follows by the Supreme Judicial Court (R. 25):

> "In 1862, Amos A. Lawrence, the father of the intestate, created a trust for her benefit, which was accumulated until 1877, and thereafter the income was paid to her during her life. At her death, the principal and unpaid income were to be distributed to such persons as she might by will appoint and, in default of appointment, to her surviving children." (See exact language of contract (R. 21). The provision for accumulation is explained in the footnote to this page.)

The 1877 Trust.

In 1877 Hetty Sullivan Lawrence conveyed to her father and to Francis W. Lawrence certain property upon trusts declared in an indenture dated January 26, 1877 (R. 4-6), described by the Supreme Judicial Court as follows (R. 25):

> "Its pertinent terms were these: She reserved to herself only a life estate of the net income but no power to revoke, alter, or amend. From and after her death, for twenty years, the net income was payable by quarter-

---

The accumulation of the income was by virtue of this provision in the contract (R. 21):

> "It is agreed that the said Hetty when of age, and during her minority her Father or Guardian, shall have liberty to have one or more of said annual payments added to said principal Sum (in order to increase said principal Sum) giving the Company notice of their intention at least sixty days before the annual time of paying said interest."

Hetty Sullivan Lawrence, the life beneficiary, came of age on December 31, 1875 (R. 18), and thereafter the determination in respect to the accumulation of the income was her own. For two years thereafter income was accumulated in the aggregate amount of $2030.13 (R. 18).

yearly payments in equal shares 'to and among such of' her children as 'may be living at the time of payment,' living issue of a deceased child to take by right of representation. At the expiration of the twenty years after the death of the intestate, the trustees were to make division of the principal of the trust equally among her children then living, the issue of any deceased to take by right of representation with the provision that, if at her death or at any time during the twenty years next thereafter no child or issue of the intestate should be living, the trustees should transfer the principal of the trust to the heirs at law of her father if he then were deceased; otherwise, to her own heirs at law."

Shortly after the creation of this trust Hetty Sullivan Lawrence married Frederic Cunningham. There were five children of the marriage: four of them, Harriet Cunningham Binney, Constance Cunningham Pertzoff, Frederic Cunningham (Jr.), and Susannah Cunningham Coolidge were born, respectively, in 1885, 1886, 1888 and 1890, and are appellants herein. A fifth child, born in 1892, died in 1923 without issue (R. 22).

The 1891 Trust.

The third trust with which this case is concerned was established under the will of Sarah E. Lawrence, mother of Hetty Sullivan Lawrence (Cunningham) who died May 27, 1891 (R. 18). The Supreme Judicial Court described this trust in these terms (R. 25-26):

"Property was thereby left to pay the income to each of her six children, two of whom are now living, and to the issue per stirpes of any such child deceased, so long as any of the six children should live; and for twenty years after the death of the last survivor, the income

was to be paid to the grandchildren and to their issue per stirpes. The will then provided that each child by will might 'appoint the shares in which' the income given to his or her children and issue 'shall be apportioned among such children and issue,' and might also appoint the proportions in which the principal given to such children and issue 'shall be divided among such children and issue.' "

Hetty Sullivan Lawrence Cunningham (frequently herein called the intestate) died intestate on August 29, 1931.

Development of the Massachusetts Inheritance Tax.

At the time of the creation of each of these three trusts there was no inheritance tax imposed by the law of Massachusetts. The earliest statute imposing such a tax (Acts 1891, chapter 425) applied only to collateral inheritance, and excluded from its operation devolution to lineal descendants.

In 1907 a statute of the Commonwealth was enacted for the first time taxing the testamentary devolution of property to lineal descendants (Acts 1907, chapter 563, effective September 1, 1907; see R. 31). This statute made no mention of powers of appointment. It provided for a rate of tax graduated according to amounts and relationships, but it did not contain any provision for uniting various interests in property, passing or accruing to a single beneficiary from or on account of the death of a decedent, for the purpose of determining the particular rate to be applied. Such a provision for uniting interests was enacted in 1924 (Acts 1924, chapter 128), and was incorporated with the first section of the statute of 1907, as amended, in a single section, which appears in the latest compilation of the Massachusetts statutes—General Laws (Ter. Ed.)—as section 1 of chapter 65. The pertinent parts of this section in its present

form, which was one of the statutes applied by appellee in this case, are as follows:

> "Section 1. All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, belonging to inhabitants of the commonwealth . . . , which shall pass by will, or by laws regulating intestate succession, or by deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made in contemplation of the death of the grantor or donor or made or intended to take effect in possession or enjoyment after his death . . . to any person, absolutely or in trust . . . shall be subject to a tax at the percentage rates fixed by the following table. . . .
>
> [A table of graduated rates here appears.]
>
> "Provided, however, that no property or interest therein, which shall pass or accrue to or for the use of a person in Class A, except a grandchild of the deceased, unless its value exceeds ten thousand dollars, and no other property or interest therein, unless its value exceeds one thousand dollars, shall be subject to the tax imposed by this chapter, and no tax shall be exacted upon any property or interest so passing or accruing which shall reduce the value of such property or interest below said amounts.
>
> "All property and interests therein which shall pass from a decedent to the same beneficiary by any one or more of the methods hereinbefore specified and all beneficial interests which shall accrue in the manner hereinbefore provided to such beneficiary on account of the death of such decedent shall be united and treated as a single interest for the purpose of determining the tax hereunder."

For the full text of this section see Appendix, p. 43.

The original statute of 1907 expressly excepted from its application the estates of persons who had died prior to its effective date. This exemption has been carried forward in all later amendments, and it now appears in its present form as section 36 of GENERAL LAWS (Ter. Ed.), chapter 65 (see Appendix to this brief, p. 47). The course of this exemption, through its most recent amendment, is traced fully in *Coolidge* v. *Commissioner,* 268 Mass. 443, at pages 446-7, and more concisely in *Coolidge* v. *Long,* 282 U.S. 582, at pages 594-5. It has always been applicable to all interests in property which "passed or accrued upon" the death of Sarah E. Lawrence.

The earliest statute of the Commonwealth purporting to levy a succession tax upon the occasion of both the exercise and non-exercise of powers of appointment was enacted in 1909 (ACTS 1909, chapter 527, section 8). In its present form this statute appears as section 2 of GENERAL LAWS (Ter. Ed.), chapter 65, quoted here in full:

> "Section 2. Whenever any person shall exercise a power of appointment, derived from any disposition of property made prior to September first, nineteen hundred and seven, such appointment when made shall be deemed a disposition of property by the person exercising such power, taxable under section one, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by the donee by will; and whenever any person possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a disposition of property taxable under section one shall be deemed to take place to the extent of such omission or failure in the same manner as though the persons thereby becoming entitled to the possession or enjoyment of the property

to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

The date named is the effective date of the 1907 statute (see R. 31), twenty-one months prior to the effective date of this act, which is June 19, 1909.

At no time has the law of the Commonwealth purported to levy a tax on gifts not testamentary in character, unless the construction given these statutes by the Supreme Judicial Court in this case results in such a tax being imposed.

The Taxes Imposed upon the Succession by Intestacy.

When the intestate died in 1931 her four surviving children were her sole next of kin and heirs at law (R. 17). The share of each child in the net amount of her estate being sufficient to bring such share within the third division of graduated rates established by GENERAL LAWS (Ter. Ed.), chapter 65, section 1 (see Appendix, p. 43), taxes were levied and paid with respect to each share in part at a rate of 1 per cent, in part at a rate of 2 per cent, and the remainder at a rate of 4 per cent. The validity of these taxes is not contested.

The Taxes Alleged to be Invalid.

1862 Trust. The appellee at the same time levied a tax upon the interests to which the several heirs at law of the intestate succeeded in the property held by the Massachusetts Hospital Life Insurance Company under the 1862 trust (R. 18). This tax was imposed upon the theory that the intestate had at the time of her death a power of appointment as to the remainder interests in the property, and that, as she had

failed to exercise that power, by GENERAL LAWS (Ter. Ed.), chapter 65, section 2, a disposition of the property should "be deemed to take place to the extent of such omission or failure in the same manner as though the persons thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will" of the intestate. Since the respective interests of the heirs at law were each of a value less than the amount specified by section 1 of that chapter as exempt from tax, no tax would have been imposed on any of them had they been assessed separately. The Commissioner, however, applying the last paragraph of section 1, united the interest of each heir at law in this property with his interest in the intestate's net estate for the purpose of fixing the rate of tax, and thereby taxed each interest in the trust at a rate of 4 per cent (R. 18).

1877 Trust. The Commissioner also at this time assessed a 4 per cent tax on the interests of the heirs at law in the property held by the trustees of the 1877 trust, again determining the rate by joining these interests to those received by intestacy. If the respective interests in the property of the 1877 trust had been treated separately they would not have been subject to tax, being within the amount exempted by the statute (R. 17-18).

1891 Trust. The life interests of the intestate's heirs at law under the will of Sarah E. Lawrence had a tax likewise assessed upon them by the Commissioner as of the date of the intestate's death. The valuation placed upon each interest was such that if it was taxable, and taxable separately, the rate of the tax would have been 1 per cent. The Commissioner, however, assessed a 4 per cent tax by joining these interests with those above described (R. 18-19). This tax (see the opinion of the Supreme Judicial Court, R. 30) seems to have been levied under section 2 of chapter 65, GENERAL LAWS (Ter. Ed.), primarily on the ground that the

interests concerned were subject to a special non-exclusive power of appointment in the decedent which she failed to exercise (R. 26, 30).

The Proceedings Below.

Each of the appellants paid his proportionate share of all these taxes assessed by the appellee, and they subsequently filed a petition for an abatement of such taxes in the Probate Court for the County of Norfolk (R. 1-4), pursuant to the second paragraph of section 27 of chapter 65 of the GENERAL LAWS (Ter. Ed.), which is printed in the Appendix, at p. 45. In their petition (R. 1, 3) the appellants claimed each and all of these taxes, excepting those assessed upon the net estate of the intestate, to be illegal and excessive, and the imposition of them to be in violation of the Constitution of the United States of America, in that they deprived the appellants of their property without due process of law and denied them the equal protection of the laws.

The Probate Court, without making any decision, reserved all questions of law presented by the pleadings and an agreed statement of facts for the determination of the Supreme Judicial Court, the highest court of the Commonwealth of Massachusetts. This procedure was in accordance with sections 9 and 13 of chapter 215 of the GENERAL LAWS OF MASSACHUSETTS (Ter. Ed.), the material parts of which are given in the Appendix, pp. 47, 48.

The Contentions of the Appellants.

The appellants have asserted that the application of the statutes by the appellee denied them the equal protection of the laws, deprived them of property without due process of law and impaired the obligation of contracts, and they based these assertions on the following principal contentions:

a) Only interests in property subject to powers created prior to September 1, 1907, are brought within the operation of section 2 of chapter 65, and that section therefore effects an arbitrary and unreasonable discrimination against the appellants, subjecting their interests to a tax which would not have been levied had the powers of appointment concerned been created at any time after that date;

b) The appellants received their interests under and by virtue of instruments made effective, beyond any power of the settlors to alter, amend or revoke, many years before the enactment of the laws sought to be applied, and their rights under those instruments, accruing before the passage of the statutes, could not be impaired by subsequent legislation;

c) The appellants' interests were received from three separate sources and they should not be united for the purpose, first, of making them taxable, and, second, of augmenting the tax; and

d) The failure to exercise a testamentary power of appointment, particularly in the case of a special non-exclusive power, is insufficient to justify the imposition of an excise tax upon successions otherwise fully determined long prior to the enactment of any statute taxing them.

On January 2, 1936, the Supreme Judicial Court sent down a rescript (R. 23), directing that the petition be dismissed, and incorporating by reference an opinion expressly denying the appellants' assertions that the taxes violated the constitutional guarantees of the Fourteenth Amendment, and holding that there was no impairment of the obligation of the contracts involved.

The Probate Court thereupon entered a final decree dismissing the appellants' petition. Under the Massachusetts practice the decree so entered constitutes the final decision of the highest court of the state in which a decision could be had, so that the appeal is taken directly from that decree.

Specification of Errors.

Recognizing that this Court will not review the rulings of a state court as to the construction of the statutes or as to their conformity to the state constitution, the appellants have assigned as errors only those aspects of the decision of the Massachusetts Court which involve Federal questions. The nine assignments of error, all of which are insisted upon (R. 33-37), present in different forms the contention that the statutes, as here construed and applied, are repugnant to the Constitution of the United States—

(1) Because they deny to the appellants the equal protection of the laws;

(2) Because they deprive the appellants of their property without due process of law;

(3) Because they impair the obligation of the contracts contained in the contract of July 24, 1862, the trust indenture of January 26, 1877, and the will of Sarah E. Lawrence.

Summary of Argument.

I. The contention of the appellants that General Laws (Ter. Ed.), chapter 65, sections 1 and 2, as construed, deny to them the equal protection of the laws, is based upon an arbitrary discrimination created by the Massachusetts statutes which affects these appellants adversely. Both the 1862 and 1891 trusts gave testamentary powers of appointment to a life tenant who was not the creator of the trust. The persons succeeding in default of appointment to the remainder interests under the 1862 trust, established *inter vivos*, were taxed on those interests at a rate of 4 per cent whereas, if the trust had been created after September 1, 1907, their interests would not have been taxed at all under either section of the statute. If the 1891 trust had become effective by the death of Mrs. Lawrence after September 1, 1907, the persons succeeding to the remainder interests

under the trust created by her will would have been taxed under section 1 at a rate of 1 per cent as succeeding to property of Mrs. Lawrence. Since Mrs. Lawrence died before that date, however, those interests are taxed at a rate of 4 per cent on the theory that the succession was to property of Mrs. Cunningham. The appellants contend that it is unconstitutionally arbitrary to say in substance that successions alleged to have taken place in 1931 will be taxed at 4 per cent if the trust instrument creating a non-exercised power of appointment was executed and delivered prior to September 1, 1907, and not taxed at all or taxed at a lower rate if the trust was executed and delivered after September 1, 1907 (see *infra*, pp. 15-23).

II. The settlors of these trusts reserved no power to affect the trust property. Whether the remainder interests of the appellants, who are children of Mrs. Cunningham, were technically vested or contingent, these appellants after 1891, when Mrs. Lawrence died, were separated from complete possession of these interests only by two uncertainties, whether they would survive their mother and whether their mother would divert the property from them by exercising her powers of appointment under the 1862 and 1891 trusts. The appellants contend (1) that the fact that these uncertainties were removed after the passage of the tax act is not sufficient to warrant a retrospective tax on the succession (see *infra*, pp. 23-36), and (2) that to tax the mere falling in of remainders due to the non-exercise of the powers of appointment as an exercise of a privilege of succession and on the basis that the property affected was that of the donee of the power (see *infra*, pp. 36-42) violates the due process clause of the Fourteenth Amendment and impairs the trust contracts.

POINTS AND AUTHORITIES.

I. The Statutes as Construed by the Courts below Deny to the Appellants the Equal Protection of the Laws.

Both the 1862 and the 1891 trusts were created by donors other than Mrs. Cunningham, the intestate life tenant to whom was given a power of appointment by will over each trust. The appellants are forced, by GENERAL LAWS (Ter. Ed.), chapter 65, section 1, as construed, to pay a tax upon their succession to interests in the 1862 and 1891 trusts solely because those trusts were created before 1907, while successions to identical trusts created after 1907 would either go untaxed or would be taxed, if at all, at a lower rate as of the death of the creator of the trust and as a part of his property.

If a settlement were made after 1907 by indenture *inter vivos* by S, a settlor, in trust for A for life, remainder as A should by will appoint, and in default thereof to A's children, the succession of the children in default of appointment upon the death of A would not be taxed by the Commonwealth.

(1) It would not be taxed by section 1 of the GENERAL LAWS (Ter. Ed.), chapter 65. That section taxes only property passing by the will or intestacy of a decedent, property passing by way of gift or under indentures created to take effect at the donor's death, and gifts made in contemplation of death (which are deemed to be equivalent to a testamentary disposition by the decedent). The section taxes the succession to such property as passing from the *donor* at *his* death (see as to this *Dexter* v. *Treasurer & Receiver General,* 243 Mass. 523). Section 1 does not purport to tax—

(a) the falling in of remainder interests, created by an indenture *inter vivos,* at the death of a life tenant *other*

than the donor, irrespective of whether or not that life tenant had a power of appointment, or

(b) the exercise or non-exercise of a power of appointment under such an indenture by a life tenant *other than the donor.*

That this is so seems clear from *Emmons* v. *Shaw,* 171 Mass. 410, decided under the old collateral legacy tax (STAT. 1891, chapter 425), which tax, although limited to successions by collateral heirs of a decedent, was in the respects here pertinent similar to section 1 of the present succession tax. It was there held that the statute did not apply to the exercise of a power of appointment in favor of a collateral of a donee of a power who was not also the donor or settlor of the trust under which the power was created.*

(2) Quite plainly section 2 would not tax the transfer under the imaginary trust created after 1907, suggested above, since the scope of section 2 is expressly limited to "any disposition of property made *prior* to September first nineteen hundred and seven." (Italics ours.)

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* This construction of the statute was founded in large measure upon the well-settled doctrine that (although equity sometimes requires that property subject to a general power of appointment exercised by the donee shall be applied to pay the debts of the donee), the general rule is that such property passes at the death of the donee under and by virtue of the original gift or will of the donor. If there is no appointment, the donee of the power has nothing to do with the property at all, and if the power is exercised, this "is to be referred to the instrument by which the power is created, and operates as a disposition of the estate of the donor" (*Emmons* v. *Shaw,* 171 Mass. at page 412). Appointments are "incorporated into the instrument creating the power."

See *Hogarth-Swann* v. *Weed,* 274 Mass. 125, 129, 130.
Cf. *United States* v. *Field,* 255 U.S. 257, 263.
Helvering v. *Grinnell,* 294 U.S. 153.

Under such a settlement as is suggested above, if created after 1907 *by will,* the succession of the appointee or remainderman would be taxed, under section one, at the rate determined by his relationship to the *donor* and not the *donee* of the power, and by aggregation with other property received from the donor.

Therefore, if the 1862 and 1891 trusts *had been created after 1907,* respectively, by deed and by will, it is plain that the successions upon which the Commonwealth has levied this excise would in the case of the 1862 trust go entirely untaxed, and in the case of the 1891 trust would be taxed as a bequest to the appellants from Sarah Lawrence, the donor.

This premise of the appellants may be restated briefly as follows:

Successions to remainders subject to powers of appointment, in default of appointment, under settlements created since 1907 by gift *inter vivos* by donors who are not also the donees of the power of appointment are not taxed under Massachusetts succession tax laws. Successions to remainders in identical settlements created prior to September 1, 1907, are, however, singled out for taxation by section 2 of the statute. As to dispositions by will containing powers of appointment, they are customarily treated as bequests from the original testator to the remainderman, and are taxed as of the death of the original testator if the testator's death occurred subsequent to 1907. Section 2 again picks out such of this class as were created before September 1, 1907, and treats them as bequests from the donee to the remainderman with the result that a different rate of tax is imposed—frequently, as in this case, a higher rate. It is the special and seemingly invidious selection of those dispositions which are peculiar only in that they were created prior to September 1, 1907, that,

the appellants submit, deprives them of the equal protection of the laws.

The general principles of equal protection are well settled.

"That clause does not prohibit classification."

Hart Refineries v. *Harmon,* 278 U.S. 499, 502.

"But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

F. S. Royster Guano Co. v. *Virginia,* 253 U.S. 412, 415.

See *Gulf, Coronado & Santa Fe Ry. Co.* v. *Ellis,* 165 U.S. 150, 155.

See *Stebbins* v. *Riley,* 268 U.S. 137, 142.

"The test to be applied in such cases as the present one is—does the statute arbitrarily and without genuine reason impose a burden upon one group of taxpayers from which it exempts another group, both of them occupying substantially the same relation toward the subject matter of the legislation?"

Colgate v. *Harvey,* 296 U.S. 404, 423.

Distinctions based upon points of time have been condemned by this Court when found to have no real relation to the tax or regulation involved.

Schlesinger v. *Wisconsin,* 270 U.S. 230.
Heiner v. *Donnan,* 285 U.S. 312.
Mayflower Farms v. *Ten Eyck,* 297 U.S. 266.

The first two cases are complicated by the fact that the attempt there was to relate a gift to the death of the donor

upon grounds which this Court found had no reasonable basis in fact. In the *Schlesinger* case, however, the Court specifically adopted as a premise a proposition which has real bearing on the instant case. It was said, at pages 239-40:

> "The court below declared that a tax on gifts *inter vivos* only could not be so laid as to hit those made within six years of the donor's death and exempt all others—this would be 'wholly arbitrary.' We agree with this view and are of opinion that such a classification would be in plain conflict with the Fourteenth Amendment."

This statement was repeated in the opinion in *Heiner* v. *Donnan,* 285 U.S. 312, 331 *et seq., supra,* and formed the basis of this Court's decision that the statute there involved was invalid when considered as a gift tax. A recent dictum serves further to emphasize the arbitrary character of such a classification:

> "If the exemption had been made to depend upon the *time* when the loan was made, instead of upon the *locality* where it was made—as, for example, a tax upon all income from loans except those made on Mondays—the arbitrary and capricious nature of the classification would scarcely be doubted."
>
> *Colgate* v. *Harvey,* 296 U.S. 404, 425.

As to the 1862 trust created *inter vivos* by Mrs. Cunningham's father, section 2 as construed operates in substance as a gift tax and, treated as such, is open to the same objections, on the ground that it is arbitrary, that are outlined in the cases cited above.

One case from a state court is almost directly in point and therefore deserves mention. In *Matter of Pell,* 171

N.Y. 48, the Court of Appeals held invalid a tax on the succession to remainder interests vesting before June 30, 1885, and one ground of this decision was that the statute exempted from its operation those remainders where the life estates expired between June 30, 1885, and March 14, 1899. The Court there said, at page 59:

> "The vice of this legislation is that it does not seek to impose a tax on all estates upon remainder, whether created by will or deed, that vested prior to June 30th, 1885, but contains the further provision that the life estate must expire after the passage of the amendment on March 14th, 1899 . . . The tax is, therefore, imposed on a limited class of remaindermen, while others who have come into possession and enjoyment, by reason of the termination of the life estate long after the early date fixed of June 30th, 1885, are not taxed.
>
> "The learned counsel for the appellant states a very apt illustration in his brief as follows: 'We often hear it declared that the legislature may designate watches and carriages as a class of property and subject the same to the payment of duties or taxes, but would any one claim that a law, declaring that all watches or carriages which were purchased prior to June 30th, 1885, should be appraised and taxed, could be sustained upon the ground that such law merely designated a class of property for taxation?'
>
> "Where the statute declares that the owners of a particular class of property, acquired at a particular time, shall be taxed, it is equivalent to naming the owners of such property; it is in no sense a general classification."

These authorities would seem to establish clearly the arbitrary character of the classification now under consideration. In the light of the *Pell* case and the statements

of this Court, referred to above, the appellants submit that section 2 of the Massachusetts act in taxing successions to settlements created before 1907, while exempting in whole or in part successions to those created after 1907, denies to them the equal protection of the laws.

Nor does the date acquire merit as a dividing line by reason of its being the effective date of the statute by which Massachusetts abandoned her former policy of taxing only collateral successions and adopted the present scheme of taxing them all. Upon the adoption of this policy, it was soon borne home upon the legislators that a source of revenue was being neglected, due to the form of section 1 and to the decision of *Emmons* v. *Shaw,* 171 Mass. 410, *supra,* which they might attempt to tap. Section 2 was therefore enacted in its present form in 1909, in order that in those cases where the first shifting of interests had escaped taxation by reason of being beyond the legislative pale, the second might bear the burden. The writers of the statute apparently ignored, if indeed it ever came to their attention, the fact that by this act they were subjecting to the excise trusts long established whose modern counterparts go free.

There is no magic in the effective date of the statute which makes justifiable a classification based thereon of those who otherwise stand in the same relation to the law.

Mayflower Farms v. *Ten Eyck,* 297 U.S. 266, *supra.*
Matter of Pell, 171 N.Y. 48, *supra.*

It is true, of course, that "The Fourteenth Amendment does not forbid statutes and statutory changes to have a beginning and thus discriminate between the rights of an earlier and later time."

Sperry & Hutchinson v. *Rhodes,* 220 U.S. 502, 505.

The Court below gave weight to this doctrine in answering appellants' contention on this point (R. 31).

The discrimination here involved, however, is not one whereby acts subsequent to the effective date are taxed and earlier ones are left untouched. Precisely the opposite is attempted, and this seems to the appellants to be entirely whimsical and unjustifiable.

In the *Mayflower* case, *supra*, decided after the Court below had rendered its decision in this case, this Court held that there was no difference between milk distributors already in business when the law was passed and those entering the field later, which justified the granting of a benefit to the former while withholding it from the latter. It may even more confidently be asserted that there is no difference between trusts set up in 1906 and those set up in 1908 which justifies the taxation of the former and the exemption of the latter. From the point of view of taxability of the various shiftings of beneficial interest, there would seem to be no difference between a disposition occurring fifty years ago and one made yesterday. So long as two settlements are equally within the reach of the law when enacted, there would appear to be no reason why one made many years ago should bear a burden, while those created recently bear a lesser load or none at all. It is true that equality in taxation need not be achieved with mathematical exactness—

> *General American Tank Car Corp.* v. *Day*, 270 U.S. 367—

but it is equally true that irrational irregularities, when substantial, will render a law invalid.

> *Gast Realty Co.* v. *Schneider*, 240 U.S. 55.
> *F. S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 416.

It is submitted that the difference in treatment here involved, both as to trusts created by deed and as to those created by will, results in substantial hardship to the beneficiaries of trusts which happen to have originated prior to September 1, 1907, and that this hardship, born of historical accident, is so wholly unnecessary and irrational as to render the law, as here construed and applied, unconstitutional.

II. The Statutes as Construed by the Courts below are Repugnant to the Due Process Clause of the Fourteenth Amendment and Impair the Obligation of the Contracts Embodied in the Agreement dated July 24, 1862, the Indenture of Trust dated January 26, 1877, and the Will of Sarah E. Lawrence.

Section 1 of chapter 65, when applied to the successions under these trusts, places a burden upon the carrying out of contracts which were made long before the statutes were passed, and to that extent it alters their terms. Section 2 of chapter 65 is so drawn that it applies only to successions established before its passage. The appellants contend that this retrospective operation of either section, or both together, is so arbitrary and unreasonable as to constitute a violation of the guarantees of the Fourteenth Amendment and an impairment of the obligation of contracts.

The retrospective application of excise tax statutes has frequently been held by this Court to be unconstitutional.

Blodgett v. *Holden*, 275 U.S. 142.
Untermyer v. *Anderson*, 276 U.S. 440.
Nichols v. *Coolidge*, 274 U.S. 531.
Coolidge v. *Long*, 282 U.S. 582.

In certain situations, however, retrospective application of excise taxes is neither arbitrary nor unreasonable. These situations are well illustrated by recent decisions of this

Court, and the cases serve to mark out the territory where retrospective operation is permissible.

(1) It is, for instance, not unfair to levy an excise when the person whose exercise of a privilege was taxed "was forewarned at the time he elected to exercise the privilege" that an excise would be imposed. The warning may be given by a prior statute, in force at the time of the exercise.

Milliken v. *United States*, 283 U.S. 15, 24.
Phillips v. *Dime Trust & Safe Deposit Company*, 284 U.S. 160, 166-7.

(2) If an attempt is made to avoid a tax by use of some legal device, which changes the form without essentially affecting the substance, the tax will be extended to embrace the attempted evasion, and a claim that the statute acts retrospectively will be unavailing.

Porter v. *Commissioner*, 288 U.S. 436.

This case involved the application of the Federal estate tax to property transferred in trust by the decedent before his death. The settlor reserved full power to alter or modify the terms of the trusts in any manner he saw fit, except in his own favor. The Court held that the property should be included in his gross estate, as the arrangement might reasonably be deemed "a substitute for testamentary disposition."

(3) Similar in character are the cases where a property owner, either to evade a tax, or for other reasons, has deprived himself or been deprived of part or all of his interest in certain property, but only for the time being, with the possibility or power of recalling that interest and enjoying it fully in his own right. There are included in this group the numerous instances of revocable trusts.

A gift of property upon trust, when the trust by its terms can be revoked at the will of the settlor, is of course no complete gift at all.

Reinecke v. *Northern Trust Co.*, 278 U.S. 339.
Bullen v. *Wisconsin*, 240 U.S. 625.
Corliss v. *Bowers*, 281 U.S. 376.

In such cases retroactivity is immaterial.

When, however, the power to revoke is qualified, say, by requiring the concurrence of some third person or persons, a tax levy by virtue of a statute subsequently enacted is on more doubtful ground, and its constitutional validity may depend upon the status of the persons whose concurrence is necessary, for as a practical matter this, taken with any interest expressly reserved to the settlor, may determine the amount of control which the settlor has retained. The greater the measure of that control, the less final is the disposition and the less question there can be of the tax violating a constitutional guarantee.

It has been decided that where the settlor reserves the income of the property to himself for life at his option, and the concurrence of any one of several trustees is all that is required if he wishes to terminate the trust or alter it in any particular, the transfer is sufficiently incomplete to render the property susceptible to a succession tax imposed by a later-enacted statute.

Saltonstall v. *Saltonstall*, 276 U.S. 260.

This decision concerns the statutes here in question, and it was relied upon to a considerable extent by the Supreme Judicial Court in sustaining the taxes to which the appellants object (R. 29, 30). It involves, however, different facts and a different theory.

The decedent in the *Saltonstall* case was the settlor of the trust. He reserved the option of receiving the income for his own use. The only practical distinction marking off the corpus of the trust from all other property that was his by outright ownership was the necessity of securing the assent of a single trustee before making inroads upon or changing the disposition of the principal. This may be considered as not a very substantial distinction, where all the trustees have been selected by the settlor, are responsible to him as a present beneficiary and are not restricted by any given standard for assent or non-assent. The trust was, in fact, three times modified; the last modification provided for the accumulation of the income thereafter, thus diminishing the settlor's interest, but this provision was made ten years after the enactment of the statute and less than three months before the settlor's death.

With the exception of the requirement of a trustee's assent for modification, *Saltonstall* v. *Saltonstall* presents the same situation as that in *Bullen* v. *Wisconsin*, 240 U.S. 625, in which the trust was held to be properly considered the equivalent of a fee in the settlor, for purposes of the Wisconsin inheritance tax. The decision in *Reinecke* v. *Smith*, 289 U.S. 172, holds that a trust subject to a revocation provision like that in the *Saltonstall* case, but under which the settlor retained no interest whatever in the income, was sufficiently his own property to make him personally responsible for the tax upon the income of the trust so long as he retained the power to revoke.

It is apparent that the *Saltonstall* case is merely consistent with well-established authority. But upon going one step beyond it, to the situation where the decedent's power over the trust is diminished by the necessity of his obtaining the consent of a beneficiary to its revocation, serious constitutional doubts arise about the *retrospective* application of a statute purporting to tax the testamentary

succession, which was passed before the decedent's death, but after the establishment of the trust.

Reinecke v. *Northern Trust Co.*, 278 U.S. 339, *supra*, at pp. 345-6, 348-9.
Cf. *Helvering* v. *City Bank Co.*, 296 U.S. 85, 88, 91.

If the next step be taken towards freeing the trust from the settlor's control, and the assent of all beneficiaries or action of all trustees is required to terminate the trust, then an attempt to levy a tax upon the testamentary transfer by a statute enacted *after* the creation of the trust but before the decedent's death violates the due process clause of the Fifth Amendment.

Helvering v. *Helmholz*, 296 U.S. 93, 97-98.
See *White* v. *Poor*, 296 U.S. 98, 102.

The cases which have been discussed demonstrate more effectively than any argument the criteria by which the element of arbitrary retrospectivity or retroactivity in the operation of excise tax statutes is determined. A statute may be retrospective or retroactive without being arbitrary if a) the person concerned received adequate warning that a tax will be imposed, or b) he is employing a substitute for a taxable subject, calculated to evade the tax, or c) his exercise of the privilege is subject to a power of recall; and to these should be added the further qualification that if he can in any normal manner escape the tax, after the statute's enactment, its retrospective application as to him cannot be considered unfair.

See *Porter* v. *Commissioner*, 60 F. (2d) 673, 675.

It is contended that, measured against these principles, the retrospective operation of sections 1 and 2 of chapter

65, as applied by the Court below, is arbitrary and invalid.

(1) In all three trusts, the settlors obviously had no knowledge of the prospective imposition of the taxes here involved.

(2) In the 1862 trust there was clearly no substitute for a testamentary disposition by the settlor, for he parted with all interest at once and reserved no control over it beyond 1875, when his daughter became of age. The 1891 trust was created by a will which took effect sixteen years before the enactment of any applicable tax. The provisions of the 1877 trust governing the transmission of the trust property were settled finally when the trust was executed. Nothing in the trust instrument gave the settlor any power to control what persons would take at the end of her life interest.

(3) In none of the trusts could the settlors look forward to the return to them of the property placed in trust.

(4) It was impossible to escape the tax, as the statutes are construed by the Court below. They would apply, no matter when the remainders fell in, or who was entitled, whether the powers were exercised or not exercised.

Any contention that the tax was not unfairly retroactive must rest either on the argument that the remainders involved were technically contingent rather than vested, or, in the instances of the 1862 and 1891 trusts, on the fact that the intestate had powers of appointment which she did not exercise. It is submitted that neither of the reasons advanced is sufficient to prevent the application of the statute to the successions under the three trusts from being so arbitrarily retroactive as to violate constitutional guarantees.

With respect to the tax as levied on each succession the case of *Coolidge* v. *Long*, 282 U.S. 582, is of great significance. That case concerned a trust established after the

enactment of the 1907 statute (Acts 1907, c. 563; now, as amended, General Laws (Ter. Ed.), chapter 65, section 1) but five weeks before its effective date. The terms of the trust reserved its income to the settlors during their lives, and provided that upon the death of the survivor the principal was to be divided among the settlors' five sons, with the further provision, however, that if any of the sons should predecease the settlors, his share should go to those entitled to take his intestate property by the law in force at the time of distribution. About ten years later the settlors assigned their interest in the trust to their sons, all of whom eventually survived the trust's termination. Upon the death of the survivor of the settlors the Commissioner taxed the succession of the beneficiaries to the property by virtue of the 1907 statute (then General Laws chapter 65, section 1). The Supreme Judicial Court sustained the validity of the tax, holding that full title did not vest in the remaindermen until the surviving settlor died, and that the succession which took place at that time was the proper subject of a tax (*Coolidge* v. *Commissioner of Corporations & Taxation,* 268 Mass. 443, 451).

Upon appeal to this Court, the decision was reversed. It was held that the right to possession and enjoyment had fully vested prior to the enactment and consequently could not be reached by the tax. This Court said (282 U.S. 597-8):

> "The settlors divested themselves of all control over the principal; they had no power to revoke or modify the trust. *Coolidge* v. *Loring, supra,* 223.* Upon the happening of the event specified without more, the trustees were bound to hand over the property to the beneficiaries. Neither the death of Mrs. Coolidge nor of her husband was a generating source of any right

* 235 Mass. 220.

in the remaindermen. *Knowlton* v. *Moore*, 178 U.S. 41, 56. Nothing moved from her or him or from the estates of either when she or he died. There was no transmission then. The rights of the remaindermen, including possession and enjoyment upon the termination of the trusts, were derived solely from the deeds. The situation would have been precisely the same if the possibility of divestment had been made to cease upon the death of a third person instead of upon the death of the survivor of the settlors. The succession, when the time came, did not depend upon any permission or grant of the Commonwealth. While the sons if occasion should arise might by appropriate suit require the trustees to account, it is to be borne in mind that the property was never in the custody of the law or of any court. Resort might be had to the law to enforce the rights that had vested. But the Commonwealth was powerless to condition possession or enjoyment of what had been conveyed to them by the deeds. *Barnitz* v. *Beverly*, 163 U.S. 118, and cases cited."

The principles set forth appear to apply with equal force to the succession under all three of the trusts involved in the case at bar. By every standard to which that quotation refers the taxes here in question appear to be invalid.

The trust established in 1877 presents a situation which in substance, although admittedly not in form, is the same as that found in *Coolidge* v. *Long*.

Considerable space is devoted by the Supreme Judicial Court in its opinion to distinguishing the succession under this trust from that involved in the *Coolidge* case (R. 27-29). The opinion relies upon the fact that in *Coolidge* v. *Long* the remainder was *vested* subject to divestment in the event that the sons of the settlors failed to survive

them, whereas in this instance the remainder interest of the children of Mrs. Cunningham was *contingent* upon their surviving her, a distinction which is only technical in nature, as the practical result in each case was identical. The surviving children in each instance were to obtain the property, and did in fact obtain it. The distinction which the Supreme Judicial Court makes has been dismissed by the courts of New York (dealing with a case under a similar statute in the same circumstances), as being without merit.

Matter of Craig, 97 App. Div. 289, 89 N.Y. Supp. 971; affirmed, 181 N.Y. 551.

In re Smith, 150 App. Div. 805, 135 N.Y. Supp. 240.

In re Wall's Estate, 138 Misc. 213, 245 N.Y. Supp. 310.

In the case first cited the Court said (97 App. Div. at pp. 291-2):

> "It seems to me to be immaterial to consider whether the remainders created by the trust instrument to which the appellants have now become entitled are to be regarded as vested or contingent . . . The point presented by the appeal is that the right as a property right to take the gifts when the time for possession and beneficial enjoyment should ultimately arrive had fully accrued at the date of the marriage and the birth of the children free from any existing tax upon the transfer regarded either as a transfer then made or contemplated in the future, and that subsequent legislation imposing such a tax must be deemed unconstitutional as in effect the taking of private property for public use without compensation or as impairing the obligation of a contract."

The Court continues (on page 293):

> "In considering the question the word 'vested' as used in the above [*Matter of Pell*, 171 N.Y. 48] and many other opinions is really to be construed as equivalent to the word 'accrued' and not as distinguished from merely contingent interests. In that sense a property right which has been fully acquired is protected by the contract and becomes in law a *vested* right, the enjoyment of which is not to be deemed as only a privilege and as such consequently subject to taxation upon the right of enjoyment."

A similar opinion is expressed in—

Matter of Vanderbilt, 172 N.Y. 69, 73.

In judging the effect of retrospective statutes upon contracts already made and successions already determined, to see whether the application is so arbitrary and unfair as to violate constitutional provisions, the decision must turn upon the question whether or not actual property rights are affected. The considerations are practical rather than theoretical, and from a practical viewpoint there is no difference between contingent remainders and vested remainders subject to divestment, when both depend upon the same event.

As the rules of vested and contingent remainders have been developed out of special conditions in the law of real property and have no connection, either logical or historical, with the question of the retrospective application of statutes, the appellants contend that the rule stated in these New York cases is both practical and reasonable, and should be applied. The doctrine of *Coolidge* v. *Long*, it is submitted, should not be limited to cases where the remainders involved are technically vested in the historical sense.

So far as the succession under the terms of the 1862 trust is concerned, the rule of *Coolidge* v. *Long* is directly applicable in its technical as well as its practical aspects. The only factor adverted to by the Court as preventing the succession by the appellants to their remainder interests under this trust from being complete (R. 29), was the presence of Mrs. Cunningham's power of appointment. The remainder interests here were limited to a class, and as such vested as soon as the first member of the class was born, subject to being opened to admit later-born members up to the time fixed for distribution.

Minot v. *Purrington*, 190 Mass. 336, 338.
Richardson v. *Warfield*, 252 Mass. 518, 522.

In fact every member of the class who was to take was born by 1890 (R. 22), so that not only the remainder as a whole was vested, but the individual interests were determined before the enactment of the tax, except in so far as they may have been slightly altered by the birth and death of one other member who did not survive the intestate.

At the time when the taxing statutes were enacted, therefore, it is clear that the only uncertainty affecting the appellants' remainder interests under the 1862 trust was the fact that they were subject to powers of appointment. It is settled law that, in the absence of other factors, remainders limited upon failure to exercise a power of appointment are vested remainders subject to divestment.

Moore v. *Weaver*, 16 Gray, 305.
Whipple v. *Fairchild*, 139 Mass. 262.
Doe dem. Willis v. *Martin*, 4 Term Rep. 39.
Sugden, Powers (8th ed.), 452.
Farwell, Powers (3d ed.), 310.

The same case, therefore, is presented by the successions under the 1862 trust as was before this Court in *Coolidge*

v. *Long;* vested remainders subject to divestment are sought to be taxed at the time the possibility of divestment ceases. It is submitted that this is invalid under the controlling authority of that decision. (See discussion of effect of Mrs. Cunningham's power of appointment, *infra,* pp. 36-40.)

The 1891 trust in this respect varies from the 1862 trust, if at all, in the fact that the particular remainder interest with which this case is concerned is a life interest in income to "the issue then living, of every one of my said six children then deceased (such issue of every deceased child taking one share according to the stocks)" (R. 10-11). The Supreme Judicial Court in discussing this remainder referred to it as contingent, but the only contingent aspects mentioned were those inherent in any life estate following another life interest (R. 29-30), and the Court appears to have rested its decision primarily, if not entirely, upon the presence of the unexercised power (R. 30). Apart from the questions with respect to this power, it is submitted—

(a) that if the appellants' remainder interests were technically vested in 1891, when the trust took effect and the appellants were all alive, the 1891 trust stands absolutely on the same basis as the 1862 trust; and

(b) that if the appellants' remainder interests are held to be technically contingent, the arguments as to the insubstantial difference between remainders technically vested and contingent remainder interests made with respect to the 1877 trust are applicable (see *supra,* pp. 30-32).

Any contention that the existence of these unexercised powers in a person other than the settlor of the trusts is sufficient to render the successions taxable must rest largely on the decision in *Saltonstall* v. *Saltonstall,* 276 U.S. 260. That case has been discussed above (*supra,* pp. 25-26). It was a case in which complete power to alter and terminate was reserved by the settlor of a trust, with

the consent of a trustee, which as a practical matter left the settlor in a position to control the disposition of the trust property as long as he lived and retained the power. It was held, largely on the authority of *Bullen* v. *Wisconsin*, 240 U.S. 625, that the privilege of succession could not be said to be fully exercised until the settlor's death, and that the imposition of the excise was not a retroactive imposition on a succession already complete.

The powers of appointment in the 1862 and 1891 trusts were not reserved in whole or in part to the settlors. Obviously, after Mrs. Lawrence's death in 1891, when her will became effective, she had no power to alter the disposition of the trust property. The settlor of the 1862 trust relinquished all control (except during the minority of the life tenant) upon the execution of the instrument. This, it is submitted, is a substantial difference of fact which makes the *Saltonstall* case inapplicable.

In the opinion in that case there also occurs, however, the following sentence (p. 271):

> "The beneficiary's acquisition of the property is equally incomplete whether the power be reserved to the donor or another."

It appears likely that these words have reference to the fact that it was immaterial that the settlor needed to obtain the consent of a probably acquiescent trustee to revoke the trust. If that is not the construction of this statement, the language was broader than the necessities of the case under consideration. In any event, it is the appellants' contention that it is not the acquisition of the *property* which is the subject of a succession tax, but the acquisition of the *right to the property*, by virtue of which the property itself would be received when the time for possession and enjoyment should arrive. This, it is sub-

mitted, was the decisive principle in *Coolidge* v. *Long*, in which case it was said (p. 600):

> "This court has not sustained any state law imposing an excise upon mere entry into possession and enjoyment of property, where the right to such possession and enjoyment upon the happening of a specified event had fully vested before the enactment."

Obviously the *right to the property* was acquired by Mrs. Cunningham's children, here appellants, and had accrued to them (subject to the exercise of the powers) in the case of the 1862 trust, at their birth, and, in the case of the 1891 trust, upon Mrs. Lawrence's death, after these appellants had all been born (R. 22). Whether that right was technically vested or contingent, it is submitted, is immaterial.

To support the imposition of an excise tax there must be an exercise of some privilege which the state may grant or withhold.

Knowlton v. *Moore*, 178 U.S. 41, 56.

Since the Massachusetts tax is imposed upon the exercise of the privilege of succession to the property, some such exercise must be found to have occurred at the time of the intestate's death. The Supreme Judicial Court purports to find that exercise occasioned by the lapse of the powers of appointment (R. 29), citing certain earlier decisions of that Court (*e.g. Minot* v. *Treasurer & Receiver General*, 207 Mass. 588, 592-3; cf. *Burnham* v. *Treasurer & Receiver General*, 212 Mass. 165). It is submitted that this decision disregards the true nature of the situation.

It is apparent that the privilege of succession and the privilege of transmission are correlative. An exercise of one implies an exercise of the other. If, therefore, the privi-

lege of succession has been exercised by the death of the donee, he having failed to exercise the power of appointment, it would seem that there must have been at the same moment a transmission of the interests taxed.

In neither the 1862 trust nor the 1891 trust had the settlor had any connection whatsoever with the trust or the trust property for many years before the enactment of the statutes in 1907 and 1909. It is apparent that any transmission from the settlors must have taken place before 1907. It is likewise true that the property has not been held by the state since that time, as it would be in the case of an estate in process of administration.

Cf. *Cahen* v. *Brewster,* 203 U.S. 543.

As was said in *Coolidge* v. *Long,* at page 598:

> "It is to be borne in mind that the property was never in the custody of the law or of any court. Resort might be had to the law to enforce the rights that had vested. But the Commonwealth was powerless to condition possession or enjoyment of what had been conveyed to them by the deeds."

If any transmission is to be found, therefore, it must have been on the part of the donee of the power.

The authorities are unanimous that the donee of a power, particularly one who does not exercise his power, has nothing to transmit. He has by virtue of the power no interest whatever in the property subject to the power that he holds. All that he has is a chance to divert the succession of the remainders from the course which they will follow if he does not act.

The relation of a donee to the property over which he has a power of appointment has been repeatedly stated.

United States v. *Field,* 255 U.S. 257, 263.

> "When a donor gives to another power of appointment over property, the donee of the power does not thereby become the owner of the property. The donee has no title whatever to the property."

Shattuck v. *Burrage*, 229 Mass. 448, 451.

That the property subject to the power is not the property of the donee clearly appears where a state having jurisdiction of the donee, but not of the donor or his estate, attempts to levy a tax upon the occasion of the power's exercise. Since the power was created elsewhere, such a tax is repugnant to the Fourteenth Amendment.

Wachovia Bank v. *Doughton*, 272 U.S. 567.

In the case where an appointment *is exercised* the donee in a sense makes the property his own and exercises domination over it. By so doing he may render the property subject in equity to his own debts, although if he had not exercised the power, his creditors could not reach it.

Shattuck v. *Burrage*, at page 451.

Thus when the donee of the power intervenes by positive action to designate and choose the channels of succession, it is not unfair to find in some degree a transmission from him. Those who had nothing before, either in enjoyment or in expectancy, now have interests in the property. Such a material change is a proper subject for a tax.

Orr v. *Gilman*, 183 U.S. 278.

Chanler v. *Kelsey*, 205 U.S. 466:

As was said in the latter case (page 474):

> "The plaintiffs in error are not in *without* the exercise of the power by the will of Mrs. Delano [the donee]."

In the present instance the children of Mrs. Cunningham are in without the donee's intervention. It would seem unreasonable to hold non-action an exercise of a privilege of transmission, or the receipt on the part of a beneficiary of an interest which comes to him as the result of another's failure to disturb existing trust limitations an exercise of the privilege of succession. The interest to which he succeeds has ripened and come into possession and enjoyment by reason of its own maturity, without the assistance of any act.

Taxing the non-exercise of a power of appointment in the same manner as its affirmative exercise has been held to be so unfair and arbitrary as to violate the Fourteenth Amendment.

In *Matter of Lansing,* 182 N.Y. 238, the Court of Appeals of New York considered the validity of a tax levied by virtue of the New York Transfer Tax Act (which was very similar to GENERAL LAWS (Ter. Ed.), chapter 65, section 2) upon the exercise of a power of appointment created before the enactment of the tax statute. The exercise had been in favor of the same persons who would have taken the property, in the same proportions, in default of exercise. The Court held the exercise of the power was not effective, and that the remaindermen could choose to take the property by virtue of the good title to it which they possessed by the terms of the original will creating the power. *Matter of Lansing* has been recently approved on this point by this court (*Helvering* v. *Grinnell,* 294 U.S. 153, 156). The Court of Appeals in the *Lansing* case, however, was also required to rule upon that part of the statute purporting to tax non-exercise in much the same terms as those employed by GENERAL LAWS (Ter. Ed.), chapter 65, section 2 (at page 247):

> "We pass without serious discussion that part of the statute which provides, in substance, that the fail-

ure or omission to exercise a power of appointment subjects the property to a transfer tax in the same manner as if the donee of the power had owned the property and had devised it by will. (L. 1897, ch. 284, §220, subd. 5.) Where there is no transfer there is no tax and a transfer made before the passage of the act relating to taxable transfers is not affected by it, because as we held in the *Pell* case such an act imposes no direct tax and is unconstitutional since it diminishes the value of vested estates, impairs the obligation of contracts and takes private property for public use without compensation. (*Matter of Pell*, 171 N.Y. 48; *Matter of Delano*, 176 N.Y. 486, 495.)"

Matter of Pell has been referred to earlier in this brief (pp. 19-21). *Matter of Delano* is the case in which the decision of the Court of Appeals was sustained by this Court in *Chanler* v. *Kelsey*, 205 U.S. 466. The New York court in that case had sustained the imposition of a tax upon the occasion of the *exercise* of the power, but its opinion contained this statement (page 495):

> "If the power had not been exercised, the question would have resembled that presented by the *Pell* case, relied upon below, where we held that a statute was unconstitutional which imposed a tax upon such remainders, already vested and non-defeasible, as should result in an absolute title after the passage of the act. (*Matter of Pell*, 171 N.Y. 48.) In that case the transfer was completed without the aid of a will and the effect was the same as a deed *inter vivos*. There was no foundation for a succession tax, which is a charge upon the right to make a will, or on the right to inherit without a will."

The Arbitrary Measure of the Tax.

The appellants also submit that there is no justification for taxing as a transmission *from the donee of the power* the vesting in possession and enjoyment of property passing in default of appointment.

This being so, the action of the appellee, the Commissioner of Corporations and Taxation, in uniting for the purpose of taxation the several interests passing under the 1862 and 1891 trusts with the general estate of the intestate Mrs. Cunningham and with each other (R. 17-18, 30-31) is clearly arbitrary. The right to the property coming to Mrs. Cunningham's children under the 1862 trust came to them from Amos A. Lawrence, that under the 1891 trust from Sarah E. Lawrence, and that under the 1877 trust from Mrs. Cunningham, the intestate, in every instance by trust limitations effective long before the taxing act. To measure the privilege of succeeding to each of these separate gifts from separate sources cumulatively and at a graduated rate based not on the amount of each gift, but on the amount of the aggregate of these gifts and of the intestate's estate, is in substance measuring the tax on the right to succeed to one person's property in part by the value of the privilege of succeeding to another person's property. This is the type of arbitrary action which has been expressly condemned in *Hoeper* v. *Tax Commissioner*, 284 U.S. 206, in which case it was said (page 215):

> "We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment."

The application of the statute here made by the Court below seems no less arbitrary. This is not a case where taxing the successions to the remainder interests passing under the 1862 trust and the 1891 trust separately, assuming they are taxable at all, is necessary to prevent an evasion of taxation by a single settlor. Cf. *Pratt* v. *Dean*, 246 Mass. 300, 309. It is a case where property moves from separate settlors to the same beneficiaries. The taxation of those successions as an aggregate results in a higher tax than if they are taxed separately. The appellants may thus properly contend that arbitrarily treating the successions under the trusts of 1862 and 1891 as if the property were all that of the intestate deprives them of property without due process of law.

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APPENDIX.

Massachusetts Statutes.

General Laws (Ter. Ed.), Chapter 65, Section 1:

"All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, belonging to inhabitants of the commonwealth, and all real estate or any interest therein and all tangible personal property within the commonwealth belonging to persons who are not inhabitants of the commonwealth except such an interest in such real estate as is represented by a mortgage or by a transferable certificate of participation or share of an association, partnership or trust, which shall pass by will, or by laws regulating intestate succession, or by deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made in contemplation of the death of the grantor or donor or made or intended to take effect in possession or enjoyment after his death, and any beneficial interest therein which shall arise or accrue by survivorship in any form of joint ownership in which the decedent joint owner contributed during his life any part of the property held in such joint ownership or of the purchase price thereof, to any person, absolutely or in trust, except to or for the use of charitable, educational or religious societies or institutions, the property of which is by the laws of the commonwealth exempt from taxation, or for or upon trust for any charitable purposes to be carried out within the commonwealth, or to or for the use of the commonwealth or any town therein for public purposes, shall be subject to a tax at the percentage rates fixed by the following table:

[Table of rates quoted only to extent here pertinent.]

Relationship of Beneficiary to Deceased.	Rate Per Centum of Tax on Value of Property or Interest.			
	On Value not over $10,000.	On Excess above $10,000, not over $25,000.	On Excess above $25,000, not over $50,000.	On Excess above $50,000, not over $250,000.
Class A.				
Husband, wife, father, mother; child, adopted child, adoptive parent, grandchild, ...	1%	1%	2%	4%
Class B.				
Lineal ancestor, except father or mother; lineal descendant, except child or grandchild; lineal descendant of adopted child; lineal ancestor of adoptive parent; wife or widow of a son; husband of a daughter, ..	1%	2%	4%	5%

"Provided, however, that no property or interest therein, which shall pass or accrue to or for the use of a person in Class A, except a grandchild of the deceased, unless its value exceeds ten thousand dollars, and no other property or interest therein, unless its value exceeds one thousand dollars, shall be subject to the tax imposed by this chapter, and no tax shall be exacted upon any property or interest so passing or accruing which shall reduce the value of such property or interest below said amounts.

"All property and interests therein which shall pass from a decedent to the same beneficiary by any one or more of the methods hereinbefore specified and all beneficial interests which shall accrue in the manner hereinbefore provided to such beneficiary on account of the death of such decedent shall be united and treated as a single interest for the purpose of determining the tax hereunder."

General Laws (Ter. Ed.), Chapter 65, Section 2:

"Whenever any person shall exercise a power of appointment, derived from any disposition of property made prior to September first, nineteen hundred and seven, such appointment when made shall be deemed a disposition of property by the person exercising such power, taxable under section one, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by the donee by will; and whenever any person possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a disposition of property taxable under section one shall be deemed to take place to the extent of such omission or failure in the same manner as though the persons thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

General Laws (Ter. Ed.), Chapter 65, Section 27:

"The commissioner shall determine the amount of tax due and payable upon any estate or part thereof and shall certify the amount so due and payable to the persons by whom the tax is payable. Such determination and certification may be made upon account of the tax payable upon the estate generally or upon account or in full for any part thereof or any interest therein. Payment of the amount so certified upon account shall be a discharge of the tax pro tanto and upon subsequent determination and certification of the full amount of the tax payable upon the estate generally or upon any interest therein or part

thereof, payment of the full amount of said tax shall, except as hereinafter provided, be a discharge of the tax, and if upon such final certification it shall appear that any payments made on account are in excess of the tax in full as so determined, the commissioner shall, upon application duly made within six months from the date when the final certificate shall have been issued, issue a certificate that the applicant is entitled to have such excess refunded and the state treasurer shall without any appropriation therefor by the general court pay the amount so certified. In determining the amount of any tax under this chapter, the commissioner shall not be required to consider any payments on account of debts or expenses of administration which have not been allowed by the probate court having jurisdiction of said estate. If after determination and certification of the full amount of the tax upon an estate or any interest therein or part thereof the estate shall receive or become entitled to property in addition to that shown in the inventory or disclosed to the commissioner at or before the time of the certification of the tax in full, the executor, administrator, trustee or other fiduciary shall forthwith notify the commissioner who shall upon being thus or otherwise informed determine the amount of additional tax, if any, due and payable thereon and shall certify the said amount to the person by whom such tax is payable, which amount shall be due and payable thirty days from the date of the certification; provided, that a fiduciary shall be personally liable to pay only so much of said additional tax as is computed on the additional property actually received by him and that a beneficiary receiving any part of such additional property shall be liable to pay so much of the tax thereon as is not chargeable as aforesaid to a fiduciary.

An executor, administrator, trustee, grantee, donee, survivor or beneficiary aggrieved by any determination of the commissioner may, within one year after the payment of

any such tax, apply by a petition in equity to the probate court having jurisdiction of the estate of the decedent for the abatement of the tax or any part thereof, and if the court adjudges that the tax or any part thereof was wrongly exacted it shall order an abatement of such part thereof as was assessed without authority of law. Upon a final decision ordering an abatement of any part of such a tax, the treasurer shall pay the amount adjudged to have been illegally exacted, with interest, without any further appropriation therefor by the general court."

General Laws (Ter. Ed.), Chapter 65, Section 36:

"This chapter shall apply only to property or interests therein passing or accruing upon the death of persons dying on or after May fourth, nineteen hundred and twenty, and as to all property and interests therein passing or accruing upon the death of persons who have died prior to said date the laws theretofore applicable shall remain in force; but so much of this chapter as relates to property or interests therein passing by deed, grant or gift completed inter vivos in contemplation of death shall apply only to such deeds, grants or gifts made on or after May twenty-seventh, nineteen hundred and twenty."

General Laws (Ter. Ed.), Chapter 215, Section 9:

"A person aggrieved by an order, decree or denial of a probate court made after this chapter takes effect, may, within twenty days after the entry thereof, appeal from the same to the supreme judicial court, and the appeal shall be heard and determined by the full court, which shall have like powers and authority in respect thereto as upon an appeal in a suit in equity under the general equity jurisdiction."

General Laws (Ter. Ed.), Chapter 215, Section 13:

"A judge of the probate court by whom a case or matter is heard for final determination may reserve and report the evidence and all questions of law therein for consideration of the full court, and thereupon like proceedings shall be had as upon appeal. And if, upon making an interlocutory decree or order, he is of opinion that it so affects the merits of the controversy that the matter ought, before further proceedings, to be determined by the full court, he may report the question for that purpose, and stay all further proceedings except such as are necessary to preserve the rights of the parties."

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Supreme Court of the United States.

OCTOBER TERM, 1936.

No. 77.

HARRIET C. BINNEY, FREDERIC CUNNINGHAM AND CONSTANCE C. PERTZOFF ET AL., *Appellants*,

v.

HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION OF THE COMMONWEALTH OF MASSACHUSETTS, *Appellee.*

APPEAL FROM THE PROBATE COURT OF THE COUNTY OF NORFOLK, COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION FOR THE COMMONWEALTH OF MASSACHUSETTS.

This is an appeal from a final decree of the Probate Court of Norfolk County, Commonwealth of Massachusetts, entered in accordance with a rescript of the Supreme Judicial Court of Massachusetts, denying the petition for abatement of inheritance taxes. The opinion of the Supreme Judicial Court was rendered on January 7, 1936, Massachusetts Advance Sheets, 1936, page 153, and the final decree of the Probate Court was entered on January 20, 1936.

The succession taxes in question were imposed in respect to the estate of Hetty S. L. Cunningham, who died intestate on August 20, 1931, and were assessed and paid upon four

different interests: *first,* Mrs. Cunningham's individual estate, which estate amounted to $299,241.58, and concerning which assessment there is no dispute; *second,* the interests passing to the four children of the intestate under a trust created by a deed of the intestate in 1877; *third,* the interests passing to these four children under a trust created in 1862 by Amos A. Lawrence; and *fourth,* property passing to these four children under the will of Sarah E. Lawrence.

The appellee combined all these four interests for the determination of the rate and the amount of the tax, and the amount so certified by him has been paid in full by the appellants.

Statement of the Case.

Hetty S. L. Cunningham died August 20, 1931, intestate, leaving as her sole heirs at law her four children, Harriet C. Binney, born June 27, 1885; Constance C. Pertzoff, born September 8, 1886; Frederic Cunningham, born December 28, 1888; and Susannah C. Coolidge, born March 19, 1890. These four children individually, and with one of them, Frederic Cunningham, as administrator of the estate of the said Hetty S. L. Cunningham, and the trustees of the will of said Sarah E. Lawrence, are the petitioners.

The material terms of the three trusts under which the appellee contends that each of the four children took an interest on the death of their mother on August 20, 1931, and upon which a succession tax on such interests was levied and collected by him are now briefly stated.

I.

THE TRUST CREATED BY THE INTESTATE IN 1877.

On January 26, 1877, the intestate, then a single woman whose name was Hetty Sullivan Lawrence, conveyed cer-

tain property in trust by a deed which was duly recorded and which required the trustees "to pay the remaining, or nett, rents and income by quarter-yearly payments to the said Hetty Sullivan Lawrence, in every year during her natural life . . . And from and after the death of the said Hetty, to pay the said nett rents and income, by quarter-yearly payments, to and among such of the children of the said Hetty as may be living at the time of payment, in equal shares, and to the lawful issue, then living, of any *her* child then deceased, such issue taking by representation the share which such deceased child would have taken had he or she been living, until the expiration of twenty years next succeeding the death of said Hetty; and upon the expiration of said twenty years, to convey in fee simple and transfer the said trust-property, original and substituted, in equal shares, to and among the children, then living, of the said Hetty, and the lawful issues, then living, if any, her child then deceased, such issue taking, by representation, the share which such child would have taken had he or she been living. If at the death of the said Hetty, or at any time during the said twenty years next thereafter, no child or lawful issue of said Hetty be living, the trustees shall convey . . . the said trust-property . . . to the heirs at law of the said Amos A. Lawrence, if he have then deceased, and if he have not then deceased, to the heirs at law of the said Hetty" (R. 4, 5).

This trust does not contain any power to revoke or amend. The several life interests of the four children passing under this trust were valued by the appellee in amounts ranging from $4366.92 to $4512.48, and a succession tax at the rate of 4 per cent, totaling $709.63, was assessed upon these life interests, and the said amount, together with interest in the sum of $7.10, was paid to the Commonwealth on October 20, 1932. The interest passing to each child under this indenture was less than $10,000,

and consequently was not subject to any succession tax imposed by the Massachusetts statutes (G.L. c. 65), unless these interests were grouped with other interests, the value of which aggregated $10,000 or more (R. 17, 18).

II.

The Amos A. Lawrence Trust.

In 1862 Amos A. Lawrence, father of the intestate, created a trust for her benefit with the Massachusetts Hospital Life Insurance Company, which was accumulated until 1877, when the income thereof was thereafter paid to the intestate during her natural life. This trust further provided that, after the death of the intestate, the company would pay the principal and interest "to her Executors or Administrators in trust, and for the special use and benefit of such person or persons as the said Hetty may appoint by her last will and testament . . . In failure of such appointment then to be distributed by said Administrators among her children, if she should leave any, (the issue of a deceased child to have the same share their parent would have been entitled to)" (R. 21).

The intestate failed to exercise the power of appointment given to her in the indenture of trust (R. 18).

The appellee determined the value of the interests passing to her four children under this trust to be $20,766.20, and assessed a succession tax thereon at the rate of 4 per cent, amounting to $830.65, which tax, together with interest amounting to 55 cents, was paid by her administrator. The interest passing to each of these four children, being under $10,000, was not subject to any tax assessed under the Massachusetts statutes (G.L. c. 65), unless their said interests were united with another or other interests, the total value of which would be over $10,000 (R. 18).

III.

The Sarah E. Lawrence Trust.

In 1891 Sarah E. Lawrence, mother of the intestate, died leaving property in trust, the income of which was to be paid to each of her six children and the issue of any deceased child so long as any of the six children should live (two are now alive), and for twenty years after the death of the last surviving child the income was to be paid to the grandchildren and to their issue. This will further provided "that any one of my said six children may by his or her will, appoint the shares in which that part of the net income which is hereinbefore given to his or her children, living at the time of payment, and to the issue then living, of any such child then deceased, shall be apportioned among such children and issue, during the time between his or her death and the time fixed for the distribution of the trust property; and also the proportions in which that part of the trust property and fund which is hereinbefore given, in such final distribution, to his or her children, then living, and the issue then living of his or her children then deceased shall be divided among such children and issue" (R. 11).

This special testamentary power of appointment given to the intestate under the will of her mother was never exercised by her (R. 18, 19).

A succession tax at the rate of 4 per cent, totaling $2876.16, was levied by the appellee upon the interests of these four children passing under the will of Sarah E. Lawrence, and this tax, together with $65.67 interest, was paid to the Commonwealth. The value of the interests which passed to each of these children was approximately $18,000 and was, therefore, under G.L. c. 65, subject to a tax of 1 per cent, if this interest was considered by itself, separate and apart from the other interests received by

the children on account of the death of their mother, but, if this interest was united with the other interests received by them, the rate would be 4 per cent (R. 19).

Contentions of the Parties.

The appellants contend that the interests received by the four children under each of these three trusts were not of a taxable nature and, secondly, that the interests passing under the 1862 trust and property passing under the will of Sarah E. Lawrence could not be united with each other or with any other interests to determine the rate of taxation.

The appellee contends that the four children took interests under each of these three trusts; that such interests were all of a taxable nature and that he was authorized to unite these interests with each other and with the interest which each child received from the estate of the intestate for the purpose of determining the tax due upon the aggregate interest of each child.

Opinion Below.

This case was reserved for the determination of the Supreme Judicial Court upon the pleadings and an agreed statement of facts without decision by the Probate Court for the County of Norfolk (R. 22). The case was decided by the Supreme Judicial Court in an opinion reported *sub nom. Binney et al.* v. *Commissioner of Corporations & Taxation,* in 1936 Massachusetts Advance Sheets, page 153, and in 199 N.E. 528. This opinion is included in the present record (R. 24).

Jurisdiction.

The appellants, in accordance with paragraph one of rule 12 of the revised rules of this court, duly filed a statement disclosing the alleged basis of the jurisdiction of this court, and contended that this court had jurisdiction by virtue of section 237 (*a*) of the Judicial Code, as amended by the act of February 13, 1925, 43 Stat. 937, 28 U.S.C.A. sec. 344 (*a*), and this court, on June 1, 1936, made an order postponing further consideration of the question of jurisdiction until a hearing of the case upon the merits.

The appellee contends that whether a tax was lawfully imposed upon the interests passing by the failure of the intestate to exercise the powers of appointment given to her in the Amos A. Lawrence trust and the Sarah E. Lawrence trust was settled by *Saltonstall* v. *Saltonstall*, 276 U.S. 260, which upheld a similar construction of the same statute by the State court.

Whether the interests passing from the three trusts could be joined with the interests passing from the individual estate of the intestate, we submit, depended upon the State statute whose construction rested with the State court. Its interpretation thereon will be accepted by this court.

The appellee, however, concedes that, if the children took a vested interest under the trust created in 1877 by the intestate, so that nothing passed to them on her death, no tax could be imposed thereon.

Coolidge v. *Long*, 282 U.S. 582.

If the construction by the State court to the effect that nothing vested in the children until and upon the death of their mother, then the imposition of a succession tax was proper.

Argument.

The rights of the children under the trust of 1877 were not fully vested at the time it was created or when the children were born. At most, until the death of the intestate, they had but a contingent remainder, and at the death of their mother they succeeded for the first time to the full ownership, enjoyment and possession. The intestate had a general power of appointment under the trust of 1862 created by her father and a special power of appointment under the will of Sarah E. Lawrence. The intestate failed to exercise either power of appointment, so that at the mother's death, on August 20, 1931, it was then finally settled who were to take the appointed property and in what proportions. All of the property passed to the children at the same time and as a result of the same event, *i.e.*, the death of the intestate. All of the property came from the intestate individually or from a trust created by her in 1877 out of her own property and from the two remaining trusts as the donee of a power conferred upon her in each of these two trusts. The identity of ownership of the property as actual owner or as donee of a power of appointment warranted the appellee in joining all these interests for the purpose of determining the rate and amount of the tax.

I.

The Interests Passing under the 1877 Trust upon the Death of the Intestate were Taxable.

When the intestate created this trust in 1877, she reserved to herself a life estate in the net income, which, upon her death, then became payable for the succeeding twenty years to such of her children "as may be living at the time of payment, in equal shares, and to the lawful issue, then living, of any *her* child then deceased . . .

and upon the expiration of the said twenty years, to convey in fee simple and transfer the said trust-property, original and substituted, in equal shares, to and among the children, then living, of the said Hetty, and the lawful issue, then living, if any, her child then deceased," and, in the absence of any living child or issue, to the heirs at law of her father, otherwise her own heirs at law (R. 4, 5). None of the intestate's children were alive at the time the trust was made. The first child was born in 1885 and the last in 1890. If the entire beneficial interest in the trust had fully vested in the children during the lifetime of the said mother and were subject only to the latter's life interest in the income, then the gift was completed not later than the birth of the youngest child in 1890, and consequently nothing passed to them upon the death of their mother in 1931. The appellants contend that the matter is settled by *Coolidge* v. *Long*, 282 U.S. 582, and that no tax is due.

The nature and character of the interests conveyed to the children by the trust instrument is to be determined by the law of Massachusetts, where all the parties lived, where the property was situated, and where the terms of the trust were to be observed and performed and its provisions and conditions to be maintained and enforced, if necessary, under the law of Massachusetts and by its courts. The trust property, in the first instance, consisted entirely of real estate, which the record does not show was ever thereafter converted into personalty. The rights of the beneficiaries were governed by the laws of Massachusetts.

Orr v. *Gilman*, 183 U.S. 278.
Chanler v. *Kelsey*, 205 U.S. 466.
Moffitt v. *Kelly*, 218 U.S. 400.

It has always been the law in Massachusetts that remainders over, posited upon the occurrence of a certain

event and then only to those who will then be eligible by the terms of the instrument to take, constitute only contingent interests. Where a will or deed not only postponed the time of payment or the actual possession or enjoyment of property, but also prescribed certain qualifications for those who were to be the recipients, then it has been held in Massachusetts that no title or interest vested before the happening of the designated event, and not even then unless the beneficiary showed that he fitted the description of those permitted to take.

In *Nash* v. *Nash,* 12 Allen (Mass.) 345, a devise of a life estate to the testator's wife, and at her death "to such of my children as may be then living, share and share alike," gave the children only a contingent and not a vested interest during the life of their mother.

In *Smith* v. *Rice,* 130 Mass. 441, a trust in land reserving life estates to the grantors and then to one of the sons and the wife of the latter, with remainder over to certain children of the son and such other children of the son as shall then be living, it was held that the grandchildren took only a contingent remainder and "that the vesting of the title, legal or equitable, in possession or in right, in those of that class who are named, as well as in those who are not named, is contingent upon their surviving the equitable tenants for life."

In *Bigelow* v. *Clap,* 166 Mass. 88, a testamentary trust gave a life estate to the daughter, and at her death a remainder over to nieces and nephews "who may then be living." Until the death of the daughter "the persons who were to take were then to be ascertained, and they could not be ascertained before." It was held that only a contingent interest was given to the nieces and nephews.

In *Carr* v. *N.E. Anti-Vivisection Soc.,* 234 Mass. 217, a trust for the benefit of a wife for life and at her death "to my heirs at law then living" was held to indicate an

intention that the remainder was to vest at the time of his wife's death in his then heirs at law; or, as was expressed by the said trust, in his heirs at law who were "then living."

In *Crapo* v. *Price,* 190 Mass. 317, a certain sum was left in trust to pay the income to Keziah Price during her life and the gift over directed the trustee "to pay, distribute and divide the said principal fund, however the same may be then invested, to and among the children of said Keziah and the issue of any deceased child by right of representation, such issue taking the share which would have belonged to their deceased parent." The directions to the trustees to divide the fund among those who could not be ascertained until after the termination of the life estate indicated that the remaindermen must be determined at that time or that all the remainders were contingent. The court further pointed out that there were no words of present gift to the children of the life tenant. "The trustees are directed to pay to Keziah Price the income during her life, and after her decease to pay and divide the principal fund to and among her children and the issue of any deceased child. The employment of such language often has been held to indicate that the testator intended that the title should not vest until the period of distribution should arrive, that the bequest should be contingent until that time." It was accordingly held that the interests of all the remaindermen were contingent and that no title vested until after the death of the life tenant.

Eager v. *Whitney,* 163 Mass. 463.
White v. *Underwood,* 215 Mass. 299.

The Supreme Judicial Court of Massachusetts held that the indenture of trust did not grant a vested interest in the children during the life of their mother. "The case at bar seems to us distinguishable from *Coolidge* v. *Long.* By the instant trust instrument the income was to be paid to

the intestate during her life, and after her death the net income was to be paid by quarter-yearly payments to such of her children 'as may be living at the time of payment, in equal shares,' with provision for payment to issue of any deceased child, 'until the expiration of twenty years next succeeding the death of' the intestate; 'and upon the expiration of the said twenty years' to transfer in absolute ownership the corpus of the trust "in equal shares to and among the children, then living' of the intestate. It is open to doubt whether this gift over could take effect as a remainder and whether its true nature is not an executory limitation. 1 Fearne on Contingent Remainders (10th ed.) 397, 398. *Simonds* v. *Simonds,* 199 Mass. 552. It is not necessary to discuss this point. It appears clear that at most the remainder was contingent and not vested until the death of the intestate. None of her children were born at the time the trust was established. Nothing then vested in them. The children of the intestate up to the moment of her death had no interest in the trust except, at best, 'a bare contingent remainder expectant upon her death and their surviving her.' *Wright* v. *Blakeslee,* 101 U.S. 174, 177. There are many decisions to the effect that trust instruments of a tenor similar to the one here in issue constitute contingent remainders, and until the event or date designated for the vesting arrives the persons to take cannot be ascertained and no estate vests in any one before the happening of that event. *Olney* v. *Hull,* 21 Pick. 311, 315. *Nash* v. *Nash,* 12 Allen, 345, 347. *Thomson* v. *Ludington,* 104 Mass. 193. *Springfield Safe Deposit & Trust Co.* v. *Ireland,* 268 Mass. 62, 66. Gray on Perpetuities (3d ed.) 86, and cases cited. The case at bar is governed by these decisions. The interest in this trust did not vest in the petitioners until the death of their mother in 1931. That was subsequent to the enactment of the tax law. Whatever interest then vested in them was subject to the tax'' (R. 28, 29).

The construction of this deed of trust was in accordance with the settled principles of law in force for years in Massachusetts, and, under that law, the Supreme Judicial Court has found the trust instrument, if it constituted anything more for the benefit of the children than an executory limitation, granted at most but a contingent remainder. The determination of the nature and effect of the interests passing under this trust was based by the State court upon the State law, and was consistent with the principles established and in force for years in that Commonwealth. The question was decided according to the common law of that State. It has been the uniform practice of the Supreme Court of the United States to accept the decision of the State court as to the law of that particular State.

De Vaughn v. *Hutchinson,* 165 U.S. 566.
Clarke v. *Clarke,* 178 U.S. 186.
Orr v. *Gilman,* 183 U.S. 278, 283.
East Central Eureka Min. Co. v. *Central Eureka Min. Co.,* 204 U.S. 266, 272.
Enterprise Irrigation Dist. v. *Canal Co.,* 243 U.S. 157, 166.
Nickel v. *Cole,* 256 U.S. 222, 226.

Where, as here, a contention is made that the imposition of a tax upon the devolution of property in accordance with a deed executed prior to the enactment of the taxing statute is contrary to the contract clause, Art. I, sec. 10, of the Constitution, then it is the rule of this court to construe the deed for itself in order to ascertain the rights therein granted to the parties, and then to determine if these rights have been impaired by the enforcement of the taxing statute.

Funkhouser v. *J. B. Preston Co.,* 290 U.S. 163, 167.

United States Mtg. Co. v. *Matthews,* 293 U.S. 232.
Violet Trapping Co. v. *Grace,* 297 U.S. 119.
Ingraham v. *Hanson,* 297 U.S. 378.

The construction of the State court is entitled to careful consideration and due weight and is to be affirmed unless it clearly appears that its interpretation was erroneous.

Board of Liquidation v. *Louisiana,* 179 U.S. 622.
Seton Hall College v. *South Orange,* 242 U.S. 100.
Nickel v. *Cole,* 256 U.S. 222.
Coombes v. *Getz,* 285 U.S. 434, 441.

The Massachusetts succession tax has always been interpreted in that State to apply in every case where "The privilege is not fully exercised until the property shall have come into the possession of the beneficiary."

Attorney General v. *Stone,* 209 Mass. 186, 190.
Minot v. *Treasurer & Receiver General,* 207 Mass. 588.
State Street Trust Co. v. *Treasurer & Receiver General,* 209 Mass. 373, 378.
Clarke v. *Treasurer & Receiver General,* 226 Mass. 301, 305.
Worcester County National Bank v. *Commissioner of Corporations & Taxation,* 275 Mass. 216, 220, 221.

A testatrix died before the enactment of a statute imposing an additional tax, which was made retroactive to a date prior to the date of her death. It was held that such additional tax was lawfully assessed because, although the title vested upon the death of the testatrix, yet the subse-

quently enacted statute was applicable because "The commodity known as succession, however, had not come to an end until after the statute became effective."

Magee v. *Commissioner of Corporations & Taxation,* 256 Mass. 512, 515, 516.

The State court, therefore, did not give any retrospective effect to the taxing statute, but found that an interest passed upon the death of the intestate in 1931, and applied the existing statute to the succession of this interest by the children.

The State Supreme Judicial Court decided that the interests passing to the children upon the death of their mother in 1931 came within the provisions of the taxing statute (G.L. c. 65, sec. 1, Appendix, *infra*) and were subject to the tax. The meaning and interpretation of this taxing statute were, in the first instance, matters for the determination of the State court, and the interpretation of a State statute by the highest court of a State will usually be adopted by the Supreme Court.

Smiley v. *Kansas,* 196 U.S. 447.
Supreme Lodge, K.P., v. *Meyer,* 265 U.S. 30.
Gregg Dyeing Co. v. *Query,* 286 U.S. 472.
Guaranty Trust Co. v. *Blodgett,* 287 U.S. 509, 513.
Great Northern R. Co. v. *Sunburst Oil & Ref. Co.,* 287 U.S. 358, 362.
Hicklin v. *Coney,* 290 U.S. 169, 172.
Hartford Acc. & Indemnity Co. v. *N. O. Nelson Mfg. Co.,* 291 U.S. 352, 358.
Burns Mortgage Co. v. *Fried,* 292 U.S. 487.
Marine Nat. Exch. Bank v. *Kalt-Zimmers Mfg. Co.,* 293 U.S. 357, 363, 366.
Morehead v. *Tipaldo,*—U.S.—(decided June 1, 1936).

The Commonwealth of Massachusetts has a right to impose an excise upon the privilege of the children receiving property which passed to them on account of the death of their mother. They had no right to receive the property or the income therefrom and no control or supervision over the property while their mother lived. The title thereto was vested in the trustees. Full title, free and unencumbered, did not vest in the children until the death of their mother. Until that moment arrived, the succession was not complete. The benefits which they then received were of a more tangible nature than those received by the surviving tenant by the entirety or the surviving joint tenant—cases in which a Federal transfer tax was held to have been lawfully imposed even if the deeds creating the tenancy were executed long before the enactment of the taxing statute.

Tyler v. *United States,* 281 U.S. 497, 503.
Klein v. *United States,* 283 U.S. 231.
Phillips v. *Dime Trust & Safe Dep. Co.,* 284 U.S. 160.
Gwinn v. *Commissioner of Internal Revenue,* 287 U.S. 224 .

The appellants claim that under the case of *Coolidge* v. *Long,* 282 U.S. 582, the State had no authority to tax the interests passing under the 1877 trust of their mother. This case, however, held that, all the rights of the children having been fully vested upon the creation of a trust which was made long before the enactment of the taxing statute, no succession tax could be laid by the State. The Commissioner, however, contends that the interests of the children were not fully vested until the death of their mother in 1931, when a taxing statute was then in force. If the children did not secure any additional rights in the property by the death of their mother, then, of course,

there was no occasion for the laying of a succession tax. *Coolidge* v. *Long,* however, does not decide that such a tax cannot be imposed in a case where definite accessions to the property are secured by the children upon the death of the settlor, even though such succession to property is provided for in an instrument executed prior to the enactment of the taxing statute. If, therefore, the title to the trust property vested in the children for the first time immediately following the death of their mother, so that her death could rightly be said to be the generating source, resulting in the vesting of economic benefits to the children, then a tax was validly imposed by the Commonwealth of Massachusetts, even though the trust was created prior to the passage of the taxing statute. That was the basis upon which the State Supreme Court determined that the tax was a lawful one, and, if this construction of the trust instrument by the State court was correct, of course there was no impairment of any contract rights, because no vested interests of the children were interfered with and because the State had a right to impose a tax upon property passing while the taxing statute was in force.

Klein v. *United States,* 283 U.S. 231.
Gwinn v. *Commissioner of Internal Revenue,* 287 U.S. 224.

The imposition of a tax under such circumstances is not forbidden by the decision in *Coolidge* v. *Long.* It does not result in an attempt by the State court to apply a taxing statute retroactively.

Reinecke v. *Northern Trust Co.,* 278 U.S. 339.
Guaranty Trust Co. v. *Blodgett,* 287 U.S. 509, 513.
Phillips v. *Dime Trust & Safe Dep. Co.,* 284 U.S. 160, 166.
Griswold v. *Helvering,* 290 U.S. 56, 58.

II.

The Interests Passing under the Trust of 1862 were Taxable.

Amos A. Lawrence in 1862 created a trust for the benefit of the intestate by depositing a sum with the Massachusetts Hospital Life Insurance Company, which agreed to pay the income to the intestate during her life and at her death to such persons as she may by will appoint and in default of any such appointment to her surviving children (see Exhibit "C," R. 19). The intestate never exercised this power of appointment, and accordingly, upon her death in 1931, her four children became entitled to receive this trust property.

The Massachusetts statute, G.L. c. 65, sec. 2 (Appendix, *infra*), expressly provided that "whenever any person shall exercise a power of appointment, . . . and whenever any person possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a disposition of property taxable under section one shall be deemed to take place to the extent of such omission or failure in the same manner as though the persons thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure." Whether the children or any of them should ever take this trust fund, or, if so, the proportion in which any or all of them should share, was entirely dependent upon whether or not the intestate exercised or omitted to exercise this general power of appointment. She had this right up to the moment of her death, and, no appointment then having been made, that event was the generating source by which economic benefits in this trust property were shifted to

the children. Under such circumstances, the passing of these interests to the children in 1931 was subject to the said Massachusetts succession tax.

Bullen v. *Wisconsin*, 240 U.S. 625.
Chase National Bank v. *United States*, 278 U.S. 327, 335, 336.
Reinecke v. *Smith*, 289 U.S. 172, 174, 175.

That the interests passing to the children under this particular statutory provision were subject to the tax in question was definitely settled in *Saltonstall* v. *Saltonstall*, 276 U.S. 260, 269, 270.

The validity of this statute imposing a tax in default of the exercise of a power of appointment has recently been upheld again by the State court in *Boston Safe Deposit & Trust Co.* v. *Commissioner of Corporations & Taxation*, 1936 Massachusetts Advance Sheets, 1411, 3 N.E. (2d) 33.

III.

The Interests Passing under the Trust of Sarah E. Lawrence were Taxable.

The will of Sarah E. Lawrence, the mother of the intestate, provided "that any one of my said six children may by his or her will, appoint the shares in which that part of the net income which is hereinbefore given to his or her children . . . shall be apportioned . . . and also the proportions in which that part of the trust property and fund which is hereinbefore given, in such final distribution . . . shall be divided among such children and issue" (R. 11). Mrs. Lawrence died in 1891 (R. 18).

The intestate, however, never exercised this power of appointment, and until the death of the latter the interests that the children would take therein could not be ascer-

tained. That depended entirely upon whether or not their mother exercised or failed to exercise this power of appointment. Their equal interests in the income resulted from the omission of the intestate to exercise the control which she had in determining how the income should be divided among her children. She had that control up to her death in 1931. Her failure to use this power of appointment resulted in the passing of this property upon her death, and by reason of her death, in equal shares to her children. The succession to these children, therefore, became completed in 1931.

The Supreme Judicial Court held that "This gift of income to the children of the intestate was contingent in a double aspect. In order to take, such child must survive the intestate and also be living at the time of payment. So, also, as to sharing in the principal; grandchildren who decease before the time set for the termination of the trust are excluded and, until that time arrives, the persons to be benefited cannot be ascertained. Apart from these contingencies, the interests of the children of the intestate did not vest upon the death of Sarah E. Lawrence in 1891, because the intestate was given power of appointment of the shares of income among her children. Until her death, the right to this interest vested in no one" (R. 29, 30).

The appellants, however, claim that the intestate only had a special power of appointment, the exercise of which was limited in favor of her children, and that, therefore, the failure to exercise such a limited power did not subject the recipients of the property to a succession tax. The State court held that this privilege of succession was taxable under a previous Massachusetts decision. "The case at bar on this point is governed by *Burnham* v. *Treasurer & Receiver General,* 212 Mass. 165. The failure of the intestate to exercise the power of appointment is indicative of approval of equal division. There appears to be no

reason to overrule this controlling authority. It has not been shaken or weakened by any subsequent decisions. We are unable to perceive that it is incompatible with any provisions of the Constitution of the United States" (R. 30).

The Massachusetts succession tax has been held to be payable out of the property appointed by the donee exercising a special and limited power of appointment.

Loring v. *Gardner*, 221 Mass. 571.

A further answer to this contention is that the passing of all property coming within the sweep of the statute is taxable. The words of the statute are broad and comprehensive and impose a tax "Whenever any person shall exercise a power of appointment . . . and whenever any person possessing such a power of appointment . . . shall omit or fail to exercise the same" (G.L. c. 65, sec. 2, see Appendix, *infra*). The statute includes a special testamentary power of appointment. Concerning the scope of this particular section, it has been said by the Supreme Judicial Court of Massachusetts that "Their words make plain the legislative purpose to impose the excise on whatever rightly may be termed a 'succession' coming within the specific statutory description. 'Succession,' as that word is used in the statute, has been said in numerous decisions to include the privilege enjoyed by the beneficiary of succeeding to the possession and enjoyment of property."

Saltonstall v. *Treasurer & Receiver General*, 256 Mass. 519, 523.

The object and aim of the statute, the nature of its subject, and its apt and broad phraseology negative any intent to exclude therefrom a special or limited power of appointment.

The conclusion of the State court that G.L. c. 65, sec. 2 (Appendix, *infra*), laying an excise upon the privilege of succeeding to property either by the exercise of a power of appointment or on account of the failure to exercise such a power, not only embraces a general power of appointment, but includes a limited or special power, cannot be said to present a Federal question, because the interpretation and construction of this statute by the State court was "controlling as to the meaning and extent of the statutory requirements."

Hicklin v. *Coney,* 290 U.S. 169, 172.
Castillo v. *McConnico,* 168 U.S. 674, 683.
Milwaukee Elec. Ry. v. *Wisconsin R.R. Comm.,* 238 U.S. 174.
Nickel v. *Cole,* 256 U.S. 222.
Supreme Lodge, K.P., v. *Meyer,* 265 U.S. 30, 33.
Stebbins v. *Riley,* 268 U.S. 137.
Hartford Acc. & Indemnity Co. v. *Nelson Co.,* 291 U.S. 352, 358.

Up to the moment of her death, the intestate, by virtue of the power of appointment, had such control and command over the appointed property that she could determine in what proportion it should be given to her children. She also had the absolute right to exercise this power and permit the property to go in equal shares to each of her children. That right over the appointed property did not cease until her death. The salient facts in the case at bar are substantially similar to those in *Saltonstall* v. *Saltonstall,* 276 U.S. 260, and the statute imposing the tax in both cases is the same identical statute. Under such circumstances the case cited is decisive of the case at bar.

Bullen v. *Wisconsin,* 240 U.S. 625.

Chase Nat. Bank v. *United States*, 278 U.S. 327, 335, 336.
Reinecke v. *Smith*, 289 U.S. 172, 174, 175.

IV.

All the Interests Passing by the Death of the Mother could be Joined for the Purpose of Determining the Amount of the Tax.

The appellants contend that the interests passing to the children under the trust of 1862 and those passing under the will of Sarah E. Lawrence could not be joined with each other or with the interests passing from the individual estate of their mother.

The death of the mother effected a completion of succession. The passing of the interests from the mother's estate and from the various trusts was motivated by the same event, and they passed simultaneously upon the happening of this identical event. The validity of the tax is not challenged in so far as the individual estate of the mother is concerned. The trust created in 1877 was made by the intestate herself and was apparently composed entirely of her own property. She was the source of succession of this trust property to her children to the same extent as she was the source of the succession of the property of her own individual estate which passed to them by intestate succession. The interests in both passed at the same time, from the same owner and upon her death.

Under the trust of 1862 and under the trust set forth in the will of Sarah E. Lawrence, the intestate was the donee of a power of appointment. Her failure to exercise the powers conferred resulted at her death in the devolution of the property to her children. In such instances the

statute considers the succession as originating with the donee. For taxing purposes the donee was virtually regarded as if she were the owner. It is true that in Massachusetts the appointee does not take from the donee of the power (*Sewall* v. *Wilmer,* 132 Mass. 131; *Emmons* v. *Shaw,* 171 Mass. 410), but it is equally true that the donee, by the exercise of the power, has such a proprietary interest in the appointed property that it can be reached by creditors of the donee and applied in satisfaction of his indebtedness, as it "commonly has been said that property so appointed should be deemed or considered or treated in equity a part of the assets of the estate of the donee of the power so far as necessary to pay his creditors' claims which otherwise would go unsatisfied."

Shattuck v. *Burrage,* 229 Mass. 448, 452.

The validity of this provision of the Massachusetts statute taxing the property to the donee first came before the State court in *Minot* v. *Treasurer & Receiver General,* 207 Mass. 588, which upheld this statute. "The condition of property which is subject to a general power of appointment contained in a will or deed, and which, in default of appointment, is to be given over to persons named, is peculiar. The donee of the power has no title to it, but he has an absolute right to dispose of it by the exercise of the power. If the power is to dispose of it by an instrument in the nature of a will signed by three witnesses, as was the fact in this case, if he exercises the power the property becomes a part of his estate for administration after his death, and may be used for the payment of his debts. His relation to it is very much like that of an owner. *Clapp* v. *Ingraham,* 126 Mass. 200. *Olney* v. *Balch,* 154 Mass. 318. Those who would take, in default of an appointment, have only an interest which is contingent upon

the conduct of the donee of the power, who can make it vest in them absolutely in possession, or can defeat it altogether. He can make it vest in possession by an appointment to the persons named as the takers in default of appointment, in which case it will be theirs, subject only to a possible use for the payment of his debts, or he can do it by an omission to exercise the power, or he can dispose of it by an appointment to others, thus terminating the contingent interest and leaving the contingent remaindermen nothing. After a will or deed containing such a power has taken effect and before the donee of the power has acted under it, have all rights of succession in possession and enjoyment so vested that there is no possibility of a succession that will come into existence later, when the final disposition of the property is determined by an exercise of the power or by a failure to exercise it? It is held, and so far as we know without dissent, that, through the exercise of the power, a right of succession to property may come into existence afterwards, which properly may be a subject for the imposition of a tax" (p. 591.) "The statute treats the result as depending upon the conduct of the donee, who may appoint or refrain from appointing. If he appoints, the succession under the statute is to be treated as determined by him, and the right thus acquired by the appointee is treated as taxable, because received as a benefit under our law. Can there be any doubt of the power of the Legislature so to treat the coming of the appointee into the succession? It seems not. To this extent the cited cases seem to go" (p. 592).

"It is but a short step further to apply the second part of the statute, which refers to coming into succession through the conduct of the donee in refusing or omitting to make an appointment that might carry the succession elsewhere. While he has the power of appointment, he is in control of the succession."

"The test to be applied to determine whether property passing by the exercise of a power of appointment is or is not subject to an inheritance tax under St. 1909, c. 527, § 8 [now G.L. c. 65, § 2], is this: Would the property in question have been subject to an inheritance tax if it had been the property of the donee of the power and had passed by way of devise or legacy under his will?"

Clark v. *Treasurer & Receiver General,* 218 Mass. 292, 293.
Loring v. *Gardner,* 221 Mass. 571.

The validity of State statutes permitting the imposition of a tax as if the donee of the power were the owner of the property has been settled in this court.

A father died prior to the enactment of a transfer tax leaving a will giving his son a power of appointment which the son exercised after such a law was passed. It is important to note in passing that the will gave the son a limited power of appointment which he could only exercise in favor of his children or the issue of such children. This power of appointment was almost as restricted as the one in the case at bar. The statute imposed a tax upon the estate of the donee as if the appointed property was owned absolutely by him. "The Court of Appeals held that it was the execution of the power of appointment which subjected grantees under it to the transfer tax. This conclusion is binding upon this court in so far as it involves a construction of the will and of the statute. Nor are we able to perceive that thereby the plaintiffs in error were deprived of any rights under the Federal Constitution. The rule of law laid down by the New York courts is applicable to all alike, and even if the view of the Court of Appeals respecting the question was wrong, it was an error which we have no power to review."

Orr v. *Gilman,* 183 U.S. 278, 288.

The estate of the donee who exercised the power of appointment, which was limited to a special class, conferred by a deed executed many years prior to the passage of a transfer tax, was subject to the taxing statute which was in force when the donee died. The attempt to avoid the tax by the claim that the property came from the donor and not from the donee was unsuccessful, as the State had the sovereign right to impose a tax upon the exercise of a testamentary power.

Chanler v. *Kelsey,* 205 U.S. 466.

The present statute, imposing a tax upon the donee "in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power" and further providing that the omission or failure to exercise such a power shall be deemed to be "a disposition of property taxable . . . to the extent of such omission or failure," was held valid in *Saltonstall* v. *Saltonstall,* 276 U.S. 260.

The source of all the property in the 1877 trust apparently included only property belonging to the intestate, and the title, use and enjoyment of this trust property passed to the children at the same time and in the same way as did the individual property of the intestate estate of their mother. In both the Amos A. Lawrence trust of 1862 and the Sarah E. Lawrence will of 1891 the intestate had a power of appointment which she did not exercise, and the rights of the children were determined by the failure to exercise this right by their mother. The Commonwealth of Massachusetts joined these four interests because, in the first two cases, it was property belonging to the mother and which came to the children on account of her death, and in the last two because, under the statute, the property covered by the power of appointment was considered as

that of the mother. The aggregate amount passing to the children was the direct result of the total benefits received by each. This, the State court has declared, is the proper basis upon which the computation of the tax is authorized by the State statutes.

The Massachusetts succession tax prescribed a graduated rate measured by the value of the property. Combining the three trusts with the intestate property of the mother required the children to pay a greater tax than if each of the three trusts and the intestate property were treated separately.

In the case at bar the Supreme Judicial Court held that "There was no error in uniting the several interests passing to the petitioners on the death of the intestate for the purpose of determining the tax under the last paragraph of G.L. (Ter. Ed.) c. 65, § 1, already quoted. Manifestly the interests passing under the 1877 trust established by the intestate were properly united with those passing from her by intestate succession. *Marble* v. *Treasurer & Receiver General,* 245 Mass. 504. *Pratt* v. *Dean,* 246 Mass. 300. The interests established by the Amos A. Lawrence trust of 1862 and those created by the will of Sarah E. Lawrence may likewise be so united. It is expressly provided by G.L. (Ter. Ed.) c. 65, sec. 2, that, whenever property passes by omission or failure of the donee of a power to exercise a power of appointment, 'a disposition of property taxable under section one shall be deemed to take place . . . as though the persons thereby becoming entitled . . . had succeeded thereto by a will of the donee of the power. . . .' Those words are thus imported into § 1 of said c. 65 and the property is taxable according to its terms. It follows that these interests by virtue of these sections are taxable as property of the intestate passing upon her death. See *Ames* v. *Commissioner of Corporations & Taxation,* 269 Mass. 352" (R. 30, 31).

The conclusion by the State court that the statute permitted the joining of the interests which the children received simultaneously at the death of their mother and also on account of her death and from the three trusts and from their mother's estate does not present a Federal question. The construction by the highest State court of a State statute is binding upon the Federal courts.

Supreme Lodge, K.P., v. *Meyer*, 265 U.S. 30, 32.
Jones v. *Prairie Oil & Gas Co.*, 273 U.S. 195, 200.
Burns Mtg. Co. v. *Fried*, 292 U.S. 487.
Graham v. *White-Phillips Co.*, 296 U.S. 27.
Borax Consolidated, Ltd., v. *Los Angeles*, 296 U.S. 10.
Morehead v. *Tipaldo*,'—U.S.—(decided June 1, 1936).

The appellants further contend that, by joining these various interests, a tax is imposed upon one person for the property of another.

Hoeper v. *Tax Commission*, 284 U.S. 206.

The tax in question, however, was not a property tax, but an excise tax laid upon the privilege of receiving property. Although the tax was in the first place paid by the administrators or the trustees, it was ultimately payable by the beneficiaries. They were only charged for the privilege of succeeding to property none of which vested in them until the death of their mother. The obligation of the tax was laid upon the succession and measured by the statutory rate for the aggregate value of the property passing to the beneficiaries. They were simply required to pay for the privilege of being permitted to take. "The Massachusetts statute by plain words places the real burden of the tax upon the legatee or other person who receives a decedent's property. Pay-

ments required of an executor are only preliminary; ultimately they must be met by the beneficiaries. Decisions of the Massachusetts Supreme Court show with adequate certainty that the right of succession is the real object of the charge laid because of property which passes by will or under the laws relative to intestacy. The thing burdened is the right to receive."

Leach v. *Nichols,* 285 U.S. 165, 169.

The excise is laid on the privilege of the beneficiaries to receive the property. It is measured by the benefit accrued. The children have benefited by receiving property from each of three trusts and from their mother's estate. The total benefit was made the standard upon which the tax was computed. It is the same tax in the same amount that would be assessed upon every one who received the same total value of property. The children should pay at the prescribed rate for the benefit which they are permitted by the State to secure and enjoy. There should be no evasion of taxes by segregating the total amount received into four parts. The case at bar is distinguishable from *Hoeper* v. *Tax Commission,* 284 U.S. 206, because, in the first place the tax in the case cited was a property tax, while in the case at bar the tax is an excise. The tax in the case cited was in part based upon property in which the taxpayer had no interest, while in the present case the tax is computed upon the amount of property received, and is ultimately payable only by those who have received this benefit. The tax is a charge upon the privilege of succession. It is laid on no one other than those who have participated in such a privilege, and its amount is only commensurate to the value of the privilege conferred. The beneficiaries are not charged on account of the property owned by another or on account of a privilege enjoyed by

another. The benefit is entirely theirs and so should be the burden, including that of taxation.

The statute (G.L. c. 65, sec. 17, see Appendix, *infra*) directly places this burden upon the beneficiaries.

Burnet v. *Leininger*, 285 U.S. 136.
Porter v. *Commissioner of Internal Revenue*, 288 U.S. 436, 444.
Burnet v. *Wells*, 289 U.S. 670, 682.

The fact that at the time of her death the legal title of the corpus of each of these trusts was in the trustees was immaterial. The children were taxed because they had become recipients of the property.

Reinecke v. *Smith*, 289 U.S. 172, 177, 178.

V.

The Taxing Statute is Not Unreasonable or Arbitrary.

The appellants further contend that the statute (G.L. c. 65, sec. 2, Appendix, *infra*) is invalid because it only applies to such written instruments creating a power of appointment as were executed prior to September 1, 1907. It is true that this statute expressly provides that, "whenever any person shall exercise a power of appointment, derived from any disposition of property made prior to September first, nineteen hundred and seven . . . and whenever any person possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor," then in either case the property passing is taxable. The date mentioned is the date upon which the Massachusetts tax first became effective upon direct descendants (Massachusetts Acts of 1907, c. 563).

Property passing by any instruments executed since September 1, 1907, would, of course, be subject to the suc-

cession tax then in force. Property which has been transferred prior to September 1, 1907, would not be amenable to the subject statute. The Legislature, however, sought to reach a large class where the succession would take place after the enactment of the taxing statute by virtue of a provision in a written instrument executed before the date of the passage of such a statute. The statute brought within its sweep property whose devolution depended upon the exercise or the failure to exercise a power of appointment, and so where the beneficiary could not finally be determined until the death of the donee, which occurred after the effective date of the statute. It was early decided in Massachusetts that the contention that such a statute, imposing a tax only in cases where the deed, trust or contract was made before September 1, 1907, was invalid was untenable. "Nor is it unconstitutional because it applied only to cases in which a succession tax remained unpaid. This is governed in principle by *Minot* v. *Treasurer & Receiver General,* 207 Mass. 588, in which a statute applying only to powers of appointment 'derived from any disposition of property made prior to September first, nineteen hundred and seven,' was held to be constitutional."

Attorney General v. *Stone,* 209 Mass. 186, 191.

Property passing in accordance with an indenture executed subsequent to the enactment of the taxing statute would be subject to the succession tax. Therefore the taxing statute is uniform and applies to all interests passing since the adoption of the statute on September 1, 1907. Such a taxing system covers the entire field and attaches to every succession occurring subsequently to its enactment.

In the case at bar the point was disposed of by the State court in these words: "The provisions of G.L. (Ter. Ed.) c. 65, § 2, are not violative of the constitutional guaranty of equal protection of the laws. They apply only to the exercise

of powers of appointment derived from any disposition of property made prior to September 1, 1907. This constitutional guaranty does not prevent reasonable classification nor condemn differences resulting from such classification. Tax laws must become operative on some date. The date named was when St. 1907, c. 563, became effective by which the tax was made applicable to direct as well as to collateral inheritances. The legislative intent possibly was to tax succession under St. 1907, c. 563, not as from the donee but from the donor of the power. Whatever the reason, the classification cannot be pronounced arbitrary or unreasonable. The tax operates equally and uniformly as to all within this class. It may fairly have been deemed by the General Court to be founded in the 'purposes and policy of taxation.' *Watson* v. *State Comptroller,* 254 U.S. 122, 125. *Maxwell* v. *Bugbee,* 250 U.S. 525, 543. *Stebbins* v. *Riley,* 268 U.S. 137, 142. *Louisville Gas & Electric Co.* v. *Coleman,* 277 U.S. 32, 37. *Hayes* v. *Missouri,* 120 U.S. 68, 71, 72. *Colgate* v. *Harvey,* 296 U.S. 404. The decision in *In re Estate of Pedersen,* 198 Iowa, 166, 172, 173, precisely supports the conclusion here reached" (R. 31).

It is true that chapter 65, sec. 2, applies only to property passing as a result of the exercise or the failure to exercise a power of appointment in any instrument created prior to September 1, 1907, the effective date of the enactment of the first statute (St. 1907, c. 563, now chapter 65, sec. 1) imposing a succession tax upon direct descendants. In the absence of such a statute, property passing by virtue of a power of appointment or in default of the exercise of such power as provided for in an instrument executed before September 1, 1907, would escape taxation although the succession did not occur until after the enactment of the taxing statute.

Emmons v. *Shaw,* 171 Mass. 410.

The Legislature had the right to lay a tax upon the basis that the property subject to the power should be considered as owned by the donee of the power.

Emmons v. *Shaw*, 171 Mass. 410, 412, 413.
Minot v. *Treasurer & Receiver General*, 207 Mass. 588.
Moffitt v. *Kelly*, 218 U.S. 400.

If the instrument creating the power was executed since September 1, 1907, then the devolution of the property comes within the sweep of chapter 65, sec. 1. The tax is in the first instance imposed upon the estate of the donor and the time and manner of payment of the tax is delayed until the succession is completed by the actual receipt of the property by the beneficiaries (chapter 65, sec. 7, *infra*).

Attorney General v. *Stone*, 209 Mass. 186.
New England Trust Co. v. *White*, 224 Mass. 332.
Moors v. *Treasurer & Receiver General*, 237 Mass. 254.

Those taking under an instrument dated prior to September 1, 1907, are treated equally upon the same basis and their tax is computed upon the value of the property received at the rate determined by their relationship with the donee. Those taking under instruments created subsequently to September 1, 1907, are also treated alike and their tax is uniformly computed upon the value of what they actually received at the rate fixed by their relationship to the donor. Every member in each class is accorded the same rights as any other member in that class. While the tax in the first instance is imposed upon the estate of the donee or the donor, depending upon whether the instrument was dated before or after September 1, 1907, nevertheless, the tax in every case is payable by the ulti-

mate beneficiary. Such a taxing statute, we submit, is valid.

Keeney v. *New York*, 222 U.S. 525, 535.

Conclusion.

The children received property passing from each of the three trusts and also from the estate of their mother. All of this property was received at one and the same time, and its receipt resulted from the death of the mother. The children did not have any rights of ownership in the corpus of the 1877 trust created by their mother until her death, and the property composing the Amos A. Lawrence trust and the Sarah E. Lawrence trust came to them on account of the failure of their mother to exercise the power of appointment given to her. The State had the right to aggregate these various interests and to compute and collect a succession tax.

We therefore respectfully submit that the decision of the Supreme Judicial Court of Massachusetts should be affirmed.

Respectfully submitted,

HENRY F. LONG, *Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts,*

By PAUL A. DEVER,
Attorney General for the Commonwealth of Massachusetts.

JAMES J. RONAN,
Assistant Attorney General.

Appendix.

Applicable Massachusetts Statutes.

The pertinent statutory provisions are contained in General Laws of Massachusetts (Tercentenary Edition), chapter 65, sections 1, 2 and 17.

"Section 1. All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, belonging to inhabitants of the commonwealth, and all real estate or any interest therein and all tangible personal property within the commonwealth belonging to persons who are not inhabitants of the commonwealth except such an interest in such real estate as is represented by a mortgage or by a transferable certificate of participation or share of an association, partnership or trust, which shall pass by will, or by laws regulating intestate succession, or by deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made in contemplation of the death of the grantor or donor or made or intended to take effect in possession or enjoyment after his death, and any beneficial interest therein which shall arise or accrue by survivorship in any form of joint ownership in which the decedent joint owner contributed during his life any part of the property held in such joint ownership or of the purchase price thereof, to any person, absolutely or in trust, except to or for the use of charitable, educational or religious societies or institutions, the property of which is by the laws of the commonwealth exempt from taxation, or for or upon trust for any charitable purposes to be carried out within the commonwealth, or to or for the use of the commonwealth or any town therein for public purposes, shall be subject to a tax at the percentage rates fixed by the following table:

Relationship of Beneficiary to Deceased.	Rate Per Centum of Tax on Value of Property or Interest.							
	On Value not over $10,000.	On Excess above $10,000, not over $25,000.	On Excess above $25,000, not over $50,000.	On Excess above $50,000, not over $250,000.	On Excess above $250,000, not over $500,000.	On Excess above $500,000, not over $750,000.	On Excess above $750,000, not over $1,000,000.	On Excess above $1,000,000.
Class A. Husband, wife, father, mother; child, adopted child, adoptive parent, grandchild, . . .	1%	1%	2%	4%	5%	5½%	6%	7%
Class B. Lineal ancestor, except father or mother; lineal descendant, except child or grandchild; lineal descendant of adopted child; lineal ancestor of adoptive parent; wife or widow of a son; husband of a daughter, . . .	1%	2%	4%	5%	6%	7%	8%	9%
Class C. Brother, sister, half brother, half sister, nephew, niece, step-child or step-parent, .	3%	5%	7%	8%	9%	10%	11%	12%
Class D. All others, . . .	5%	6%	7%	8%	9%	10%	11%	12%

"Provided, however, that no property or interest therein, which shall pass or accrue to or for the use of a person in Class A; except a grandchild of the deceased, unless its value exceeds ten thousand dollars, and no other property or interest therein, unless its value exceeds one thousand dollars, shall be subject to the tax imposed by this chapter, and no tax shall be exacted upon any property or interest so passing or accruing which shall reduce the value of such property or interest below said amounts.

"All property and interests therein which shall pass from a decedent to the same beneficiary by any one or more of the methods hereinbefore specified and all bene-

ficial interests which shall accrue in the manner hereinbefore provided to such beneficiary on account of the death of such decedent shall be united and treated as a single interest for the purpose of determining the tax hereunder.

"SECTION 2. Whenever any person shall exercise a power of appointment, derived from any disposition of property made prior to September first, nineteen hundred and seven, such appointment when made shall be deemed a disposition of property by the person exercising such power, taxable under section one, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by the donee by will; and whenever any person possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a disposition of property taxable under section one shall be deemed to take place to the extent of such omission or failure in the same manner as though the persons thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

. . . . . .

"SECTION 7. Taxes imposed by this chapter upon property or interests therein, passing by will or by laws regulating intestate succession, shall be payable to the commissioner by the executors, administrators or trustees at the expiration of one year from the date of the giving of bond by the executors, administrators or trustees first appointed; except that in all cases where there shall be a devise, descent or bequest to take effect in possession or come into actual enjoyment after the expiration of one or more life estates or of a term of years, the taxes thereon shall be

payable by the executors, administrators or trustees in office when such right of possession accrues, or, if there is no such executor, administrator or trustee, by the persons so entitled thereto, at the expiration of one year from the date when the right of possession accrues to the persons so entitled.

"If the probate court, acting under section thirteen of chapter one hundred and ninety-seven, has ordered the executor or administrator to retain funds to satisfy a claim of a creditor, the payment of the tax may be suspended by the court to await the disposition of such claim.

"Taxes imposed by this chapter upon property or interests therein, passing by deed, grant or gift to take effect in possession or enjoyment after the death of the grantor or donor, or upon beneficial interests arising or accruing by survivorship in any form of joint ownership, shall be payable by the grantee, donee or survivor at the expiration of one year from the date when his right of possession or enjoyment accrues. Taxes imposed by this chapter upon property or interests therein passing by deed, grant or gift made in contemplation of death shall be payable by the grantee or donee at the expiration of one year after the death of the grantor or donor.

"In case of any deed, grant or gift of a life interest or term of years, the donee for life or years shall pay a tax only on the value of his interest, and the donee of the future interest shall pay his tax when his right of possession or enjoyment accrues."

. . . . . .

"Section 17. An executor, administrator or trustee holding property subject to the tax imposed by this chapter shall deduct the tax therefrom or collect it from the legatee or person entitled to said property; and he shall not deliver property or a specific legacy subject to said tax until he has collected the tax thereon. An executor or ad-

ministrator shall collect taxes due upon land passing by inheritance or will which is subject to said tax from the heirs or devisees entitled thereto, and he may be authorized to sell said land, in the manner prescribed by section twenty-one, if they refuse or neglect to pay said tax."

SUPREME COURT OF THE UNITED STATES.

No 77.—October Term, 1936.

Harriet C. Binney, et al., Appellants,
vs.
Henry F. Long, Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts.

Appeal from the Probate Court, County of Norfolk, Commonwealth of Massachusetts.

[December 14, 1936.]

Mr. Justice Roberts delivered the opinion of the Court.

This appeal is from an order denying abatement of succession taxes assessed in respect of the estate of Hetty S. L. Cunningham, late a resident of Brookline, Massachusetts. Mrs. Cunningham died intestate in August 1931 leaving as her sole heirs four children, who, with the trustees and certain beneficiaries of three trusts wherein she had life estates, were the petitioners below and are the appellants here. She left a substantial estate of her own which descended to her four children. Their succession to this estate was taxed, the tax was paid, and its legality is not questioned. Pursuant to the terms of the three trusts, her four children succeeded, upon her death, to the ownership and possession of certain property whereof she had been life tenant with power of appointment of principal; and succeeded to the enjoyment as life beneficiaries of other property as to which she had preceded them as life tenant. The appellee held the succession to the trust property taxable, and added the value of the corpus of Mrs. Cunningham's own estate and that of the interests to which the appellants succeeded upon her death with the result that the trust interests took a higher rate. The taxes assessed upon the three trust interests were paid and a petition was filed in the probate court for abatement in the view that the exaction was forbidden by Article I, Section 10, and the Fourteenth Amendment of the federal Constitution. The probate court reserved the questions, the Supreme Judicial Court decided them adversely to appellants[1] and upon its rescript the petition was denied.

In 1877 Mrs. Cunningham (then Hetty Sullivan Lawrence) conveyed property in trust reserving a life estate in the income but no

[1] Mass. Adv. Sheets, 1936, p. 153; 199 N. E. 528.

power to revoke, alter or amend. The income was to be paid for twenty years after her death "to and among such of" her children as "may be living at the time of payment", living issue of a deceased child to take by right of representation. If, at her death, or at any time during the twenty years thereafter, no child or issue of hers should be living the trustees were to transfer the principal to the heirs of her father, if he were then dead; otherwise, to her own heirs. She married and had five children, one of whom, born in 1892, died in 1923, without issue. The others, born between 1885 and 1890, are appellants.

In 1862 Amos A. Lawrence, the intestate's father, paid a sum of money to an insurance company which agreed to pay the income to the intestate and, upon her death, to distribute the principal and any unpaid income, to such persons as she might, by will, appoint, and in default of appointment, to her surviving children.

Sarah E. Lawrence, the intestate's mother, died May 27, 1891. Her will bequeathed property in trust to pay the income to each of her six children, two of whom still survive, and to the issue, *per stirpes*, of any deceased child so long as any of her children should live. For twenty years after the death of the last survivor of her children the income was to be paid to her grandchildren and their issue, *per stirpes*, and, at the expiration of that period, the principal was to be divided between the grandchildren, *per capita*, descendants of a deceased grandchild to divide his or her share *per stirpes*. Each child of Sarah E. Lawrence was empowered to "appoint the shares in which" the income given to his or her children and issue "shall be apportioned among such children and issue" and further to appoint the proportions in which the principal "shall be divided among such children and issue." Under this provision the four children of Mrs. Cunningham, who are appellants, succeeded to equal life estates in their mother's share, she having failed to exercise her power.

When the trusts were created Massachusetts imposed no inheritance or succession tax. The first statute imposing such a tax [2] applied only to collateral inheritance and excluded devolution to lineal descendants. In 1907 a law was enacted taxing testamentary devolution of property to lineal descendants;[3] this made no mention

[2] Acts 1891, c. 425.
[3] Acts 1907, c. 583, effective Sept. 1, 1907.

of powers of appointment; the tax was graduated according to amounts and relationships, but there was no requirement of aggregation of various interests passing and accruing to a single beneficiary from or on account of the death of a decedent to ascertain the rate of tax. Such a provision for uniting interests was enacted in 1924,[4] and incorporated with the first section of the act of 1907 as amended into a single section.[5]

The act of 1907 and its amendments were prospective in operation and exempted estates of those who had died prior to its effective date.[6] This exemption has extended to all interests which passed or accrued upon the death of Sarah E. Lawrence, the intestate's mother.

In 1909 provision was made for a succession tax upon the occasion of the exercise of, or nonexercise of, powers of appointment.[7] This, in its present form, is section 2 of chapter 65 of the general laws.[8] The effective date of this provision was declared to be September 1, 1907, which was the effective date of the 1907 act, and was twenty-one months prior to the effective date of the 1909 act in which the provision is embodied. It is conceded that there are no other statutes purporting to tax succession under nontestamentary gifts.

The acts are compiled in the general laws of the Commonwealth, and, so far as material to the present controversy, are:

General Laws (Ter. Ed.) c. 65:

"Section 1. All property within the jurisdiction of the commonwealth, corporeal or incorporeal, and any interest therein, belonging to inhabitants of the commonwealth . . . . which shall pass by will, or by laws regulating intestate succession, or by deed, grant or gift, except in cases of a bona fide purchase for full consideration in money or money's worth, made in contemplation of the death of the grantor or donor or made or intended to take effect in possession or enjoyment after his death . . . to any person, absolutely or in trust . . . shall be subject to a tax at the percentage rates fixed by the following table . . .

[A table of graduated rates here appears.]

"Provided, however, that no property or interest therein, which shall pass or accrue to or for the use of a person in Class A, except

[4] Acts 1924, c. 128.
[5] General Laws (Ter. Ed.) c. 65, § 1.
[6] General Laws (Ter. Ed.) c. 65, § 36.
[7] Acts of 1909, c. 527, § 8.
[8] General Laws (Ter. Ed.) c. 65, § 2.

a grandchild of the deceased, unless its value exceeds ten thousand dollars, and no other property or interest therein, unless its value exceeds one thousand dollars, shall be subject to the tax imposed by this chapter, and no tax shall be exacted upon any property or interest so passing or accruing which shall reduce the value of such property or interest below said amounts.

"All property and interests therein which shall pass from a decedent to the same beneficiary by any one or more of the methods hereinbefore specified and all beneficial interests which shall accrue in the manner hereinbefore provided to such beneficiary on account of the death of such decedent shall be united and treated as a single interest for the purpose of determining the tax hereunder.

"Section 2. Whenever any person shall exercise a power of appointment, derived from any disposition of property made prior to September first, nineteen hundred and seven, such appointment when made shall be deemed a disposition of property by the person exercising such power, taxable under section one, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power, and had been bequeathed or devised by the donee by will; and whenever any person possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a disposition of property taxable under section one shall be deemed to take place to the extent of such omission or failure, in the same manner as though the persons thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure."

. . . . . .

"Section 36. This chapter shall apply only to property or interests therein passing or accruing upon the death of persons dying on or after May fourth, nineteen hundred and twenty, and as to all property and interests therein passing or accruing upon the death of persons who have died prior to said date the laws theretofore applicable shall remain in force; but so much of this chapter as relates to property or interests therein passing by deed, grant or gift completed inter vivos in contemplation of death shall apply only to such deeds, grants or gifts made on or after May twenty-seventh, nineteen hundred and twenty."

THE 1877 TRUST.

The trust created by the intestate in 1877, by deed *inter vivos*, reserved no power of revocation or alteration and, in this respect, differed from that under consideration in *Saltonstall* v. *Saltonstall*, 276 U. S. 260. The appellants insist that the invalidity of Sec-

tion 1, *supra,* as applied to their succession is established by *Coolidge* v. *Long,* 282 U. S. 582, since to tax them would under the doctrine of that case impair the obligation of the intestate's contract, and deprive them of property without due process. The court below thought that case not controlling because there the remainders were vested from the date of the gift, whereas here the interests of appellants were executory or, at the best, contingent remainders which never vested until the intestate's death. In *Coolidge* v. *Long* this court concluded that the tax laid by the act of 1907 offended the contract and due process clauses of the federal Constitution because the interests of the remaindermen had vested at the date of the creation of the trust many years prior to the passage of the taxing act. It was held that the mere taking possession of that which had been vested in the beneficiaries for many years did not amount to a taxable occasion and constitutionally could not be so designated by the Commonwealth in view of the complete vesting of the beneficiaries' estates in remainder at the date of the execution of the deed.

The Supreme Judicial Court, following an unbroken line of authority in Massachusetts, and in accordance with the common law[9] and the law as declared by this court[10] holds that the appellants' estates, under the trust instrument of 1877, were, at most, contingent remainders which did not vest until after the intestate's death, and hence the transfers to them fell clearly within the statutory definition as made to take effect in possession or enjoyment after the donor's death. The appellants urge that, in imposing a succession tax, the state should disregard technical rules relating to the vesting of interests and look to the substance and they insist that for many years prior to 1907 those who were to take in succession to the intestate were ascertained, subject only to the contingency that, as in *Coolidge* v. *Long,* some of them might fall out of the class by death. The contention was made and rejected in *Coolidge* v. *Long.* The fact that the remainders were vested from the date of the deed, and the interests of those who took in remainder were merely subject to be defeated by a condition subsequent, was the basis for the conclusion that the tax could not constitutionally be laid upon the

[9] 1 Fearne, Contingent Remainders, (10 Ed.) 397, 398; Gray, Perpetuities (3 Ed.) 86.

[10] *Wright* v. *Blakeslee,* 101 U. S. 174, 177.

occasion of their acquiring physical possession of what had, in the eye of the law, long been their property. Having relied on legal rather than practical considerations to invalidate the tax in *Coolidge* v. *Long* it would be inconsistent here to rely on practical rather than legal considerations to invalidate the same tax. The Commonwealth was not prevented by the constitutional provisions which the appellants invoke from taxing the succession under the 1877 trust upon the occasion of the intestate's death since the appellants' estates never vested until that event.

As Mrs. Cunningham's death was the occasion for a tax upon the succession of those who take in remainder after her life estate we can conceive of no constitutional objection to the statutory provisions for uniting the interest thus derived with that which the appellants acquired in Mrs. Cunningham's own property at her death, and calculating the rate on the total according to a sliding scale.

THE 1862 TRUST.

The act of 1907, (Sec. 1, *supra*) does not purport to tax complete and irrevocable transfers *inter vivos,* not in contemplation of the donor's death, made subsequent to the effective date of the act. The 1862 contract was not made in contemplation of the grantor's death; it became effective when executed. Such a transfer made to-day would result in no tax upon the interest acquired by the life tenant or upon those interests resulting from her exercise or non-exercise of her power of appointment. By the act of 1909, however, (Sec. 2, *supra*) the legislature, while not attempting to tax the interests of the appellants as derived in succession to Amos A. Lawrence, does essay to tax those interests as derived from the intestate as the holder of a power of appointment under Amos A. Lawrence's contract. But the statutes do not tax similar interests the enjoyment of which depends upon the exercise or nonexercise of a power embodied in a deed effective after September 1, 1907. The law, therefore, creates two classes,—the one composed of beneficiaries who take at the death of the donee of a power created by an instrument antedating 1907, who are taxed,—and the other of beneficiaries who take in succession to the donee of a power conferred by a deed executed subsequent to 1907, who are not taxed. Upon its face the statute arbitrarily selects a past date, taxing the beneficiaries of an act if done prior to, and leaving untaxed

beneficiaries of a precisely similar act if done subsequent to that date. In justification of the discrimination the court below suggests that any change in the state's policy of taxation must take effect at some point of time. The truth of this statement is obvious but the appellants' complaint is not directed at the fact that inheritances occurring prior to the effective date of the act of 1907 have escaped taxation while those happening thereafter are subjected to the exaction. The claim that the statutes deny equal protection is based upon quite another sort of discrimination. Succession consequent upon testamentary gifts (that is those made by will, or in contemplation of death or to take effect in possession or enjoyment after death) made or to take effect after the date of the act is the subject of the excise. The succession to non-testamentary gifts made subsequent to the effective date of the act of 1907 is not taxed whether the person coming into ownership and enjoyment of property does so by virtue of the direct gift of the former owner or by virtue of the exercise or non-exercise of a power of appointment vested by the former owner in a third party. Thus the future policy of the Commonwealth is declared to be that those who benefit by a testamentary gift are to be taxed while those who benefit, either immediately or remotely, from a complete and irrevocable gift *inter vivos* are not to be taxed. On the other hand, the statutes declare that one who benefits remotely through the exercise or non-exercise of a power under an absolute gift long since completed is to bear the burden of the exaction. This is not the declaration of a new policy effective after the promulgation of the legislation. On the contrary the statutes declare the policy to be the exemption for the future of a well-known type of succession, while at the same time imposing a tax on the identical type if resulting from a past gift.

Neither the appellee nor the Supreme Judicial Court advances any satisfactory reason for this difference in treatment of persons similarly circumstanced.

The Supreme Judicial Court states:

"The legislative intent possibly was to tax succession under St. 1907, c. 563, not as from the donee but from the donor of the power. Whatever the reason, the classification cannot be pronounced arbitrary or unreasonable. The tax operates equally and uniformly as to all within this class. It may fairly have been deemed by the General Court to be founded in the 'purposes and policy of taxation.'"

Instead of assigning any reason for the discrimination the statement merely points out that two classes are created, those who are taxed and those who are not, and since all who are taxed are treated alike and all who are exempt are treated alike the statute is uniform in operation upon each class; and thus falls short of meeting the question for decision.

As we have noted the only basis for the classification is the time when the estate was created. This court has said that a tax on gifts *inter vivos,* so laid as to hit those made within a given period prior to the donor's death and exempting all others, would be wholly arbitrary. *Schlesinger* v. *Wisconsin,* 270 U. S. 230. And we have also said that a discrimination in the taxation of loans based solely upon the time when the loan was made would clearly be arbitrary and capricious. *Colgate* v. *Harvey,* 296 U. S. 404, 425.

It is said that prior to the passage of the act of 1909 succession derived through a power granted by an instrument effective before September 1, 1907, escaped taxation although the interest of the beneficiary really had its origin subsequent to that date; and thereby the Commonwealth unfairly lost taxes which were its due and discrimination resulted between beneficiaries under trusts created before and after September 1, 1907. The argument, however, overlooks the fact that a transfer through a power created after September 1, 1907, is, notwithstanding the act of 1909, still wholly untaxed where, as in the case of the trust under consideration, the power is to be exercised by a third party and the gift is not made in contemplation of the settlor's death. We fail to see how fairness, either to the Commonwealth or its citizens, is promoted by taxing the appellants, the beneficiaries of a trust made many years before the succession tax laws were adopted while exempting beneficiaries similarly situated in all respects save only that the trust was created after September 1, 1907. The discrimination becomes the more glaring when it is remembered that the tax is increased by the aggregation of the interest passing to the beneficiaries under the 1862 contract with that which they derive by inheritance from the intestate. Thus a beneficiary taking through a power under an *inter vivos* non-testamentary trust, created after September 1, 1907, would not have to aggregate the interest so derived with property inherited from the donee of the power, whereas one taking, as do the appellants, under a power in a deed executed in 1862 is compelled, by aggregation of the interests, to pay at a much higher rate on the property derived through the power.

In view of the hostile discrimination against a class of remaindermen arbitrarily singled out for taxation from all those similarly situated, we are bound to hold the statutes deny the equal protection of the laws in contravention of the Fourteenth Amendment.

THE 1891 TRUST.

In their operation upon the trust created in 1891 by the will of Sarah E. Lawrence the statutes discriminate between the appellants and others similarly situated. The discrimination differs in kind from that exhibited in the case of the 1862 trust but is equally hostile and arbitrary.

When Mrs. Lawrence died in 1891 the interests created in her lineal descendants were wholly exempt from taxation. When, in 1907, the Commonwealth adopted a policy of taxing succession by lineals the statute said nothing of powers of appointment. Nevertheless, under that act, had it been in force when Mrs. Lawrence died, the intestate, her daughter, would have paid a tax upon the value of the life estate given her by her mother's will and the appellants when they came into possession of remainder interests, upon the intestate's death, would likewise have been compelled to pay a tax upon their succession to Mrs. Lawrence's estate. The act of 1909 (Section 2, *supra*) recognizing that the act of 1907 (Section 1; *supra*) does not apply to the succession generated at the death of Mrs. Lawrence nevertheless pitches upon the fact that under her will the intestate had a power of appointment and makes the takers of Mrs. Lawrence's property in succession to the intestate liable for a tax as if the property had descended from the intestate. As directed by Section 1 the appellee aggregated the interest falling to the appellants under their grandmother's will with that coming to them from their mother under the intestate law. Thus the interest derived under the 1891 trust is taxed in the higher brackets at four per cent whereas had it been created by a will effective after September 1, 1907, the tax would be computed as upon a succession to Mrs. Lawrence's estate alone, and at a rate of one per cent.

The same considerations which have been stated in respect of the 1862 trust are controlling as to this one. We think it an arbitrary and unreasonable discrimination that the beneficiary of a power must aggregate the interest so derived with that enjoyed by inheritance of property owned in fee by the donee of the power, if the instrument creating the power antedates 1907, but need not so

aggregate the interests for the purpose of taxation if the creation of the power be subsequent to 1907. The consequence that the one must pay at a higher rate on the interest falling in at the death of the donee of the power than the other who takes by reason of an exactly similar event, denies the equal protection of the law to the former.

The argument that the act of 1909 tends to render collection of taxes more certain by accelerating the time of payment and making the executors the collectors of the tax is answered by the provisions of Sec. 7 of Chapter 65 of the General Laws (Ter. Ed.). Remaindermen become liable for the tax not at the death of the donor but when they come into possession and enjoyment of the property at the expiration of a life estate or term of years. The tax on their succession is then payable by any fiduciary who then holds the property, and, if none is in office, by the beneficiaries themselves. It cannot therefore successfully be contended that the act of 1909 was adopted with a view to earlier or more certain collection of the tax.

The Commonwealth seeks to support the statutes upon well known principles: that the guaranty of equal protection does not compel adoption of an iron rule of equal taxation, preclude variety in taxation, or forbid classification of subjects if the discrimination is founded upon a reasonable distinction or if any state of facts reasonably can be conceived to sustain it; and that where the evident purpose is to deal fairly and equitably in classifying the subjects of taxation, a statute will not be condemned because of minor and incidental hardships or inequalities due not to a hostile purpose but to ir erent difficulties or inadvertence. The claim is that the discrimination against the appellants is justified by either or both of these principles. While this court always accords great weight to the judgment of a state legislature, we cannot agree that there is here a fair basis for difference of treatment. All that is said in defense of the statute is that it treats alike all those who take under instruments executed prior to an arbitrary past date, and treats alike all those who take under instruments made subsequent to the same arbitrary date, and that the legislature may have found some reason for the discrimination in the state's policy of taxation. But this is merely to say that arbitrary classification which is the result of the exercise of the legislative will must be sustained. The alternative and inconsistent contention that the

discrimination is the result of inadvertence, cannot prevail. The act of 1907 was prospective in its operation. Knowing that that act did not reach successions under deeds or wills effective prior to September 1, 1907, the legislature adopted the acts of 1909 and 1924 to put those who succeeded to remainder interests created prior to September 1, 1907, into a taxable class while leaving wholly exempt or taxing on a different basis and at a different rate remaindermen taking under instruments effective subsequent to September 1, 1907. To suggest that this was an attempt to bring about equality which failed through inadvertence is to be blind to the obvious purpose and intent of the legislature. Action could not have been more deliberate.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 77.—October Term, 1936.

Harriet C. Binney, et al., Appellants,
vs.
Henry F. Long, Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts.

Appeal from the Probate Court of the County of Norfolk, Commonwealth of Massachusetts.

[December 14, 1936.]

Mr. Justice Cardozo, dissenting in part.

I am unable to concur in so much of the opinion of the court as invalidates the tax upon the interests passing to the appellants under the deed of 1862 and reduces the amount of the tax under the will of 1891.

On September 1, 1907, the Commonwealth of Massachusetts laid a tax upon the subject of any transfer to take effect in possession or enjoyment after the death of a donor, whether the succession was brought about by will or intestacy or gift *inter vivos*. Acts 1907, c. 563. This court held in *Coolidge* v. *Long*, 282 U. S. 582, that as to remainders already vested, but dependent upon an estate for life, the tax so imposed is a denial of due process, though the life estate did not end until after the passage of the statute. In 1909 the legislature of the Commonwealth enacted another statute providing in substance that where the transfer becomes complete through the exercise or non-exercise of a power of appointment (cf. *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 270, 271; *Guaranty Trust Co.* v. *Blodgett*, 287 U. S. 509, 511) the succession shall be deemed to have been derived from the donee of the power, if the power had its origin in a disposition of property made before September 1, 1907, and if made after that date, from the donor of the power. Acts 1909, c. 527, § 8: G. L. (Tercentenary Ed.) c. 65, § 2. Is the result of that amendment an unlawful discrimination when applied to the deed of 1862 and the exercise or non-exercise of the power there created?

If succession must be treated as derived from the donor, irrespective of the date when the power was created, many interests will go free that in fairness should contribute their quota to the fisc.

"Whatever be the technical source of title of a grantee under a power of appointment, it cannot be denied that in reality and substance it is the execution of the power that gives to the grantee the property passing under it." *Matter of Dows,* 167 N. Y. 227, 231; aff'd sub. nom. *Orr* v. *Gilman,* 183 U. S. 278, 287; *Matter of Delano,* 176 N. Y. 486; aff'd sub. nom. *Chanler* v. *Kelsey,* 205 U. S. 466, 478. This court has held that a legislature does not violate the Fourteenth Amendment by giving heed to these realities when taxing a succession. *Orr* v. *Gilman,* supra; *Chanler* v. *Kelsey,* supra. The cases that have been cited had their origin in New York. For a time the tax laws of Massachusetts were drawn along stricter lines. *Emmons* v. *Shaw,* 171 Mass. 410, 413. Until the Act of 1909, a transfer through a power, if made under an instrument effective before September, 1907, escaped taxation altogether, though the gift in substance and reality may have had its origin thereafter. Acts 1907, c. 563, sec. 25; cf. *Saltonstall* v. *Saltonstall,* supra; also *Saltonstall* v. *Saltonstall,* 256 Mass. 519, 522, 525. This was unfair to the Commonwealth. It was perhaps unfair to legatees who were taxable under gifts of later date. But the evil, however patent, was not subject to correction through the medium of a uniform rule taxing the succession under every power of appointment exercised thereafter, and taxing it as derived from the primary donor. Such a method of assessment would be adequate in its application to instruments to be executed in the future, but quite inadequate as to instruments executed in the past. There was need for a distinction based on difference in time.

One may take for illustration a will made in 1914, seven years after the Act of 1907, and another made in 1900, seven years before. Each, let it be assumed, provides for a life estate, with power to the life tenant to appoint the remainder, and with a gift over to children in default of an appointment. The life tenants die in 1921. If an assessment is made upon the right of succession under the will of later date, there will be no difficulty in collecting the tax, economically and swiftly, out of the estate of the donor. The power having been created after 1907, the executors will be under a duty to retain so much of the estate as may be necessary to pay the tax in full. But in respect of the 1900 will, the situation is very different. The probability is that before the adoption of the statute the executors under that instrument will have been given their dis-

charge. In that event the probate court will no longer have control of the estate, and the Commonwealth will be left to a precarious remedy against remaindermen deriving their possession through the non-exercise of the power, if perchance the failure to exercise it becomes known at all. Estates of subsequent donors will thus be made to bear the burden while those of earlier donors are left substantially immune. The amendment of 1909 corrects that inequality. Has it substituted another to be condemned as more offensive?

The rule is elementary that a state in adopting a system of taxation is not confined to a formula of rigid uniformity. *Swiss Oil Co.* v. *Shanks*, 273 U. S. 407, 413. It may tax some kinds of property at one rate, and others at another, and exempt others altogether. *Bell's Gap R. R.* v. *Pennsylvania*, 134 U. S. 232; *Stebbins* v. *Riley*, 268 U. S. 137, 142; *Ohio Oil Co.* v. *Conway*, 281 U. S. 146, 150. It may lay an excise on the operations of a particular kind of business, and exempt some other kind of business closely akin thereto. *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 62; *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, 94; *Armour Packing Co.* v. *Lacy*, 200 U. S. 226, 235; *Brown Forman Co.* v. *Kentucky*, 217 U. S. 563, 573; *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 255; *State Board of Tax Comm'rs* v. *Jackson*, 283 U. S. 527, 537, 538. What is true of division into classes according to subject matter must be true of division into classes dependent upon time. The temporal arrangement must have its origin, to be sure, in something more than whim or fantasy, a tyrannical exhibition of arbitrary power. If that reproach has been avoided, the classification does not fail because the burdens before and after are not always and everywhere in perfect equilibrium.

From all this it follows that a distinction between wills or deeds effective before 1907 and those effective afterwards—the exercise or non-exercise of powers under instruments of the first class giving rise to a succession to be taxed as a bequest from the donee, and the exercise or non-exercise of powers under instruments of the second class to be taxed as a bequest from the donor—is not rooted in caprice. The point of time which separates the classes is not interjected arbitrarily or by an exertion of brute force, but corresponds to the behests of a rational taxonomy. This being so, the division ought not to fail because the deed of 1862 was framed in such a

way that succession thereunder would not have been taxable to any one, either the estate of the donor or that of the donee, if a like deed had been executed after the passage of the statute. A legislature cannot be expected in drafting legislation to think out every conceivable situation in which the members of one class will bear a heavier burden than the members of another. Under the statute challenged as invalid many deeds *inter vivos* continue to be taxable irrespective of their date. An interest in remainder to take effect in possession or enjoyment through the exercise or non-exercise of a power of appointment after the death of the donor (*Guaranty Trust Co.* v. *Blodgett, supra*) will gain nothing from the fact that a non-testamentary conveyance brought the power into being. The only reason why this particular interest would be exempt if the deed of 1862 had been made after August, 1907, is because the remainder was so limited that the power might be exercised while the donor was yet alive. Such untoward accidents do not take a method of division out of the domain of the rational into the land of whim and fantasy. Eccentricities of incidence are common, and perhaps inevitable, in every system of taxation. The future would have to be scanned with microscopical powers of vision to foresee and forestall every possible diversity. For present purposes it is enough that the order of events removes the stigma of caprice from a system of classification whereby donees of a power before the passage of the act are treated as grantors, the tax to be laid upon that basis, whereas donors of a power are recognized as the source of the succession in respect of transfers afterwards. *Emmons* v. *Shaw, supra.* "And inequalities that result not from hostile discrimination, but occasionally and incidentally in the application of a system that is not arbitrary in its classification, are not sufficient to defeat the law." *Maxwell* v. *Bugbee*, 250 U. S. 525, 543. Cf. *Metropolis Theatre Co.* v. *Chicago*, 228 U. S. 61, 69, 70; *Salomon* v. *State Tax Commission*, 278 U. S. 484, 491.

What has been said as to the deed of 1862 and the power there created applies with equal force to the will of 1891 and to the quantum of the tax payable by the legatees thereunder.

For these reasons I dissent from the modification of the decree and vote to affirm it.

Mr. Justice BRANDEIS joins in this opinion.